Supreme Court, U. S.
FILED
SEP 16 1980
MICHAEL RODAK, JR., CLERK

80-488

No.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

COMMONWEALTH OF MASSACHUSETTS.
PETITIONER,

v.

JEFFREY A. BRANT,
RESPONDENT.

Petition for Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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I.

Questions Presented.

I. Whether truthfully informing a defendant, after he has declined to answer questions without his attorney being present, that his co-defendant has made a statement constitutes interrogation under Rhode Island v. Innis, ___ U.S. ___, 100 S. Ct. 1689 (1980)?

II. Whether police behavior which constitutes "subtle compulsion" requires supression of all statements without regard to intervening circumstances?

III. Whether Rhode Island v. Innis, supra, should be granted retroactive application to trials concluded prior to the date of that decision?

Parties.

The Commonwealth and Jeffrey A. Brant are the sole parties to this petition.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES
October Term, 1980

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

JEFFREY A. BRANT
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR WRIT OF CERTIORARI

The Commonwealth prays that a writ of certiorari issue to review the judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1980) 1473, 406 N.E. 2d 1021. The opinion of the Appeals Court is reported at Mass. App. Ct. Adv. Sh. (1979) 2124, 395 N.E. 2d. 1320.

Jurisdiction.

The judgment of the Court below was entered on June 18, 1980. An application for an extension of time to and including September 16, 1980 in which to petition for a Writ of Certiorari was allowed on July 14, 1980 (Brennan, J.). The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3)

Constitutional Provision Invoked.

Fifth Amendment.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictmnet of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall

be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statement of the Case.

The respondent was convicted of armed robbery while masked and sentenced to not less than eighteen years nor more than thirty years. Prior to trial he filed a motion to supress statements as they were obtained in violation of his Constitutional rights. After a hearing the motion was denied in part and the respondent excepted. The Appeals Court found no error. Mass. App. Ct. Av. Sh. (1979) 2124, 395 N.E. 2d. 1320 (App. B). The Supreme Judicial Court granted further appellate

review and applying Rhode Island v. Innis, ____ U.S. ____, 100 S. Ct. 1682 (1980), reversed the judgment on the basis that all statements and admissions "should have been excluded as obtained in violation of his rights under the Fifth Amendment of the Constitution of the United States" Commonwealth v. Brant, Mass. Adv. Sh. (1980) 1473, 1484 406 N.E. 2d. 1021 (App. A.).

Statement of Facts.

The facts material to the consideration of the questions presented are summarized as follows:

On December 28, 1977, an employee of a market was held up by two armed men who were masked. In the course of the robbery the clerk was shot and seriously wounded. The robbers fled. On February 4, 1978, the respondent and one Neil Kampen, Jr. were

arrested in Florida, after a high speed chase in which shots were exchanged with police. On being booked, each was informed of his Miranda rights. Brant requested and was permitted to call he public defender.

On the following day they were brought to court on the Florida charges and were represented by a public defender who was on February 13, 1978, relieved from representing them. On that day Massachusetts authorities requested by telephone that the Florida deputy sheriff, Hudepohl, interview Brant and Kampen concerning the Massachusetts robbery. On February 14, Hudepohl interviewed Kempen and informed him of the call from Massachusetts. He stated that he wished to obtain Kampen's side of the story and that he would not inquire about the Florida charges. Hudepohl informed Kampen of his Miranda's rights and ascertained that he

understood them. Kampen replied "Yes" to Hudepohl's question "Do you wish to talk with me now without a lawyer?" Kampen then gave the Sheriff an inculpatory statement which was recorded on tape and on the following day transcribed, signed by Kampen and notarized. At the close of the interview Kampen was permitted to talk briefly with Brant.

As noted by the Appeals Court there was testimony that prior to any interrogation, Brant had already discussed with Kampen the possibility of making a "deal" to return to Massachusetts and avoid imprisonment in Florida. Commonwealth v. Brant, Mass. App. Ct. (1979) 2124 395 N.E. 2d. 1320 (1979). (App. B).

Kampen's inculpatory statement was communicated to Massachusetts and complaints against him issued in

Massachusetts for armed robbery while masked and for assault with intent to murder. An assistant district attorney then left for Florida with two police officers.

On February 15, Kampen and Brant, new and separate counsel having been appointed to represent each of them, were arraigned on the Florida charges. The Massachusetts officials and Hudepohl were present in court at the arraignment and knew that Brant and Kampen were represented by counsel. They intended to interrogate Brant later that day. That afternoon Brant and Kampen were brought to an interview room in the jail, where the Massachusetts officials and Hudepohl had gathered. Hudepohl turned on a tape recorder and began to read to Brant his rights from a document entitled "Brevard County Sheriff's

Department Interrogation Preamble". Included therein was the question, "Are you willing to proceed without an attorney being present to represent you?" In the document this question is followed by a blank space for the response of the person being interviewed. When Hudepohl read the question to Brant, Brant replied "No". Hudepohl then wrote that response on the document. One of the Massachusetts officials then mentioned the fact that Kampen had already given a statement to the police. Hudepohl stated that this was so and that Kampen's statement had been signed and notarized. Hudepohl then turned off the tape recorder. At that juncture, Kampen remarked that his statement was "all lies." Brant then requested to speak with Kampen privately. That request was granted.

Fourteen minutes later Brant and Kampen returned to the interview room. Brant

asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied with his request and again directed Brant's attention to the interrogation preamble and specifically to the question of Brant's willingness to proceed without an attorney being present to represent him. Brant himself crossed out the earlier response "No", wrote in "Yes", and signed his name indicating his willingness to make a statement without his attorney being present.

There followed questions by Hudepohl and answers by Brant. At some point, Kampen volunteered a response to a question and one of the Massachusetts officials joined the dialogue. At this point, Hudepohl reminded Kampen of his Miranda rights, ascertained that he understood them and obtained an affirmative answer when he asked Kampen whether he still wished to

talk without having his attorney present. Other questions to Brant and Kampen followed with their responses, the latter virtually amounting to confessions to the Massachusetts offenses.

The Court further found that while incarcerated in the county jail each had been told by other prisoners that if they were convicted and incarcerated in Florida they would be subject to homosexual attacks. Finally, the Court also found that the authorities "in permitting Brant to speak with Kampen, hoped and expected that Brant would change his mind and make a statement." (Findings, Rulings and Order on Defendants' Motions to Suppress, (App. C).

Reasons for Granting Review.

Summary.

The decision below constitutes an overly broad and expansive application of

this Court's recent decision in Rhode Island v. Innis, ____ U.S. ____, 100 S. Ct. 1682 (1980), which applies only the first prong of the test enunciated in that decision. In doing so the Court below, in effect establishes a per se prohibition against any police conduct after a defendant has claimed a right under Miranda v. Arizona, 384 U.S. 1602 (1966), if an incriminating response is forthcoming, regardless of intervening circumstances.

Moreover, it is of utmost importance to resolve whether the new rule announced in Innis to the effect that the term "interrogation" no longer means simply "questioning", but now extends to "any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an

incriminating response from the suspect" ((footnotes omitted) (Innis at 1689)) should be accorded retroactive application to trials concluded before the announcement of that decision, or, whether this new constitutional rule of criminal procedure, like Miranda v. Arizona, 384 U.S. 436 (1966) itself, should apply only to trials begun after the decision was announced. See Johnson v. New Jersey, 384 U.S. 719, 732 (1966).

Argument.

I. THE ACTION OF THE POLICE AFTER THE DEFENDANT HAD CLAIMED HIS RIGHTS UNDER MIRANDA V. ARIZONA, SUPRA DOES NOT REFLECT A MEASURE OF COMPULSION SUFFICIENT TO CONSTITUTE INTERROGATION UNDER RHODE ISLAND V. INNIS, ___ U.S. __ 100 S. CT. 1689 (1980).

The effect of the interpretation and application of Rhode Island v. Innis ___ U.S. ___, 100 S. Ct. 1682 (1980) by the Court below is to automatically impute a

measure of compulsion to every act of police authorities thus rendering those words or actions as necesserily constituting interrogation barred by Miranda, supra. Such is not the holding of this Court in Innis. In Innis, this Court held that the term interrogation was not limited to express questioning but extended to certain psychological ploys or techniques of persuasion which the police should know are reasonably likely to evoke an incriminating response. This Court, it is submitted, did not eliminate from consideration the question of whether the words or actions of the official in a custodial setting were such as would "subjugate the individual to the will of his examiner" which was the concern in Miranda. However, the Court below automatically imputes a sufficient measure

of compulsion to an officer's true statement that a co-defendant, who was present at the interview, had made a statement, to render that action impermissable interrogation under Innis, thus rendering a subsequent incriminating response subject to the exclusionary rule. Such a per se equation of any police action with an impermissable compulsion drastically expands the mandates of the Fifth Amendment as enunciated by this Court. Such an expansion of constitutional mandates is beyond the power of a state court. Oregon v. Hass, 420 U.S. 714 (1975)

Moreover, the Court below has ignored the second prong of the test enunciated in Innis which must be met before an incriminating response may be excluded; that is, that the response is indeed the product of the officer's statement. Here,

the statement elicited no incriminating response. That it may have provided an "impetus" for Brant's further action is not sufficient for applying the exclusionary rule. The Court below has erred in the same manner as did the Supreme Court of Rhode Island in Innis. Innis at 1691.

II. POLICE BEHAVIOR WHICH CONSTITUTES "SUBTLE COMPULSION" DOES NOT REQUIRE SUPRESSION OF A STATEMENT WHICH IS THE PRODUCT OF INTERVENING CIRCUMSTANCES.

The sequence of events is of utmost importance in determining whether under a reasonable interpretation of this Court's decision in Innis suppression was either mandated or warranted in the instant case.

In the instant case Brant indicated that he did not wish to proceed without an attorney present. In the course of terminating the interview one of the Massachusetts authorities said that Kampen

had already given a statement to the police. Hudepohl added that the statement had been signed and notarized. The tape recorder was turned off. This interview lasted but 5 minutes from 1657 hours to 1702 hours (Tr. 311, 313). Kampen then said his statement was "all lies." Brant requested to speak with Kampen privately and the request was granted. Fourteen minutes later at 5:16 p.m. Brant and Kampen returned and Brant immediately requested the tape recorder be turned on as he wished to make a statment. Hudepohl did so and again asked if Brant were willing to proceed without an attorney. Brant crossed out the "No" and wrote in "Yes".

At the outset it should be noted that there is no evidence of any coercion, threats or promises; there was no suggestion by the authorities that Brant

should talk to Kampden; and the police did not say anything when Brant voluntarily returned from his private conversation with Kampen.

Even though the officers subjective hope was that in permitting Brant to talk to Kampen he would change his mind, this factor is not sufficient to render the police conduct illegal. Rhode Island v. Innis established an objective test. Innis at 1690. Here the officer's true statement did not elicit an incriminating response from Brant. It elicited only a statement from Kampen, "its lies".

It is totally unreasonable to extend the Innis definition of interrogation to hold improper the police's assent to Brant's request to speak to Kampen[1/]

1/There is nothing in the record to support an inference that Kamper was in any sense operating as an agent of the police.

The incriminating response followed the conversation with Kampen without any conduct by the police except to again ask Brant if he wished to proceed without an attorney *after* he had said he wanted to make a statement.

It is submitted that *Innis* did not establish a per se rule that any statement or conduct on the part of the police constitutes continued interrogation in violation of rights under *Miranda*. Rather, it must be words or action "the police should know are reasonably likely to elicit an incriminating response" *and* "[i]t must also be established that a suspect's incriminating response was the product..." of those words or actions. *Innis*, at 1689, 1691.

Even if the statement at issue, truthfully appraising a suspect of his

situation constitutes impermissible conduct, the Court below failed to apply the second prong of the test, for the officer's statement in fact did not elicit an incriminating response. That response followed Kampen's spontaneous statement, Brant's request for a private conversation, and fourteen minutes of private conversation. The incriminating response was the product of these intervening circumstances.

The argument that it would not have occurred "but for" the police officer's statement goes too far. Such an analysis would render inadmissable a statement if Brant had requested and been permitted to telephone a third party and then made a statement. The analysis of Wong Sun v. United States, 371 U.S. 471 (1963) is more aptly applied to the instant situation.

> "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint."

Id. at 488.

Here, assuming the police officer's statement constitutes an illegality there was no exploitation, the spontaneous statement by Kampen and the self-initiated conversation intervened. The incriminating response was the product of the conversation, not the words or action of the police. Therefore it is submitted that the ruling below failed to properly apply the two-prong test of Innis and has greatly expanded Innis to establish a per se rule requiring supression if the police engage in any activity which they hope will result in a suspect's changing his mind. This absolutistic approach is at odds with this

Court's decision in North Carolina v. Butler ___ U.S. ___, 99 S. Ct. 1755 (1979), which eschews a per se approach, and operates to distort this Court's decision in Innis.

This approach also totally dismisses the unequivocal words of this Court in Michigan v. Moseley, 423 U.S. 96 (1975), wherein the court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his' right to cut off questioning' was 'scrupulously honored.' The Court below has now extended this "critical safeguard", the right to cut off questioning, to include the right not to be granted that which the suspect requests. Such a paternalistic rule has been rejected by this court. Farretta v. California, 422

U.S. 806 (1975), See Michigan v. Moseley, supra at 109 (White, J. concurring). It is respectfully submitted that although the Innis decision is relatively recent, clarification of that decision is of urgent importance to law enforcement authorities.

III. THE RULE OF RHODE ISLAND V. INNIS SHOULD NOT BE ACCORDED RETROACTIVE APPLICATION TO TRIALS CONCLUDED PRIOR TO THE DATE OF THAT DECISION.

The defendants were found guilty after trial by a jury on September 22, 1978. The judgment was affirmed by the Appeals Court on October 31, 1979. The decision of this Court in Rhode Island v. Innis was rendered on May 12, 1980. On further appellate review, the Supreme Judicial Court heard argument on April 8, 1980 and reversed the conviction on June 18, 1980. The Supreme Judicial Court without discussion of the retroactivity problem applied the Innis

decision to reverse the judgment previously affirmed by the Appeals Court.

In Innis this Court for the first time gave constitutional definition to the term 'interrogation', a definition which goes far beyond the traditional notion that to interrogate means simply and solely the process of questioning or questions propounded by police. Not only in Miranda but in subsequent cases had interrogation been discussed in the context of 'questioning.' See Michigan v. Mosely, 423 U.S. 96 (1979).

Such a new standard governing in-custody interrogation should not, for the same reasons applied to the seminal case of Miranda v. Arizona, supra, be applied to trials concluded prior to the date of the decision. In Johnson v. New Jersey, 384 U.S. 719 (1966), it was held

that the exclusionary rule relating to custodial interrogation established in Miranda would be available only to persons whose trials had commenced after the date of that decision. Johnson at 733. It is submitted that the new procedural definition of interrogation and the exclusionary rule which flows from such a definition should in the name of consistency be accorded no wider application than the effect accorded Miranda.

It is of utmost urgency that the question of prospective or retroactive application be decided promptly. As the instant case so aptly illustrates, the expanded definition of interrogation now renders illegal a practice properly held to be legal by both the trial court and the Appeals Court. It constitutes an

unnecessary disservice to law enforcement officers, operating in good faith, to hold retroactive a decision so extending the concept of interrogation beyond its ordinary or dictionary meaning.

Moreover, it is clear, without exaggeration, that retroactive application will have an extremely substantial impact on law enforcement and the criminal justice system itself. In addition to Massachusetts, the appellate courts of at least four other states[2/] have already applied the Innis decision.

2/State v. Durand, ___ Neb. ___, 27 CrL. 2326 (6/10/80); State v. Jones, ___ La. ___, 27 CrL. 2342 (6/23/80); People v. Bodner, ___ N.Y. S. 2d (App. Div.) ___, 27 CrL. 2414 (7/10/80); State v. Wiberg ___ Minn. ___, 27 CrL. 2374 (7/3/80).

Conclusion.

For the reasons stated above the Commonwealth submits that a writ of certiorari should be granted.

Respectfully submitted,

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COMMONWEALTH *vs.* JEFFREY A. BRANT.

Norfolk. April 8, 1980. — June 18, 1980.

Present: HENNESSEY, C.J., QUIRICO, WILKINS, & BRAUCHER, JJ.

Evidence, Admissions and confessions. *Constitutional Law*, Admissions and confessions, Waiver of constitutional rights, Assistance of counsel. *Waiver*. *Practice, Criminal*, Instructions to jury, Comment by prosecutor.

INDICTMENT found and returned in the Superior Court on February 27, 1978.

A motion to suppress was heard by *Young*, J., and the case was tried before *Linscott*, J.

After review by the Appeals Court, the Supreme Judicial Court granted leave to obtain further appellate review.

Thomas P. McCusker, Jr., for the defendant.

Charles J. Hely, Assistant District Attorney (*Gerald M. Kirby*, Assistant District Attorney, with him) for the Commonwealth.

HENNESSEY, C.J. This is an appeal by the defendant Brant under G.L. c. 278, § 33A-33G, from his conviction for armed robbery while masked. Prior to trial Brant filed a motion to suppress statements. After a hearing the motion was denied in part and Brant filed his exception. The case was tried before a jury, Brant was found guilty, and the trial judge imposed a sentence of not less than eighteen years nor more than thirty years at the Massachusetts Correctional Institution at Walpole. Brant claimed an appeal, asserting as errors the denial of his motion to suppress an inculpatory statement given by him to authorities and the allowing of a certain closing argument to the jury by the prosecutor involving the defendant's right to remain silent. The Ap-

peals Court, with one judge dissenting, concluded that there was no error and that the judgment should be affirmed. Mass. App. Ct. (1979).[a] We conclude that there was error in the motion judge's denial[1] of the motion to suppress Brant's statement and that the judgment of conviction must be reversed. In reaching this result we observe that neither the motion judge nor the Appeals Court had the benefit of *Rhode Island* v. *Innis*, U.S. (1980),[b] upon which we rely in part in this opinion, and which, to say the least, brings new shades of meaning to the issues raised in this case.

We summarize the facts as found by the motion judge and from our own reading of the trial transcript. On the night of December 28, 1977, a food store in Norwood, Massachusetts, was robbed by two masked men, one of whom carried a rifle or a sawed-off shotgun. A woman clerk was shot and seriously wounded by one of the robbers, who then escaped. Brant and one Kampen were arrested in Titusville, Florida, on February 4, 1978, after a high-speed automobile chase which involved the exchange of gunfire. Kampen was booked at 9:30 A.M. and Brant, who had eluded his pursuers somewhat longer, was booked at 2:10 P.M. During the booking procedures, each was informed of his Miranda rights and each was specifically asked whether he wished to call the public defender. Kampen said only that he would see the public defender in court that morning, while Brant requested and was permitted to call the public defender.

On Sunday, February 5, 1978, both Kampen and Brant were brought into court for a proceeding which, the parties stipulated, involved the setting of bail and a probable cause hearing on certain Florida charges. The Florida public defender appeared and represented both defendants.

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[a] Mass. App. Ct. Adv. Sh. (1979) 2124.

[1] It will be noted that the trial was held before a different judge from the one who ruled upon the motion to suppress.

[b] 48 U.S.L.W. 4506 (May 12, 1980).

Following this hearing Kampen and Brant were held in custody at the Brevard County jail, one of a complex of buildings in the county seat, which included the sheriff's office and, across the street, the courthouse. Kampen and Brant were held in separate cell blocks and could not converse with each other. Each of the defendants was told by other prisoners that, if they were convicted and sent to one of Florida's State prisons, they would be subject to homosexual assaults.

On February 13, 1978, the Florida public defenders' office was relieved by court order from representing Kampen and Brant due to a conflict of interest between these defendants and a juvenile apprehended with them. On that same day, Assistant District Attorney Tiernan of Norfolk County, Massachusetts, telephoned Deputy Sheriff Hudepohl of Florida and requested that he seek to interview Kampen and Brant concerning the incident which is the subject of the present indictments.

Hudepohl arrived at the jail sometime shortly before 10 A.M. and asked to have Kampen and Brant brought to him. Kampen arrived first and was taken by Hudepohl into a small interview room adjacent to the main control room of the jail. He first informed Kampen that he wished to interview him concerning Massachusetts offenses. Hudepohl also told him that Tiernan had called and said that he wanted Kampen's side of the story. Hudepohl cautioned Kampen that he would not inquire about the Florida charges and carefully read him his Miranda rights, making sure after each question that Kampen understood. Hudepohl then asked Kampen, "Do you wish to talk with me now without a lawyer?" Kampen said, "Yes." Kampen proceeded to give Hudepohl an inculpatory statement which, when transcribed, covered six pages.

The motion judge found that, at the time Kampen first spoke with Hudepohl, he was calm and collected and quite familiar with his Miranda rights, not only from his Florida experiences, but from earlier occasions on which those rights had been read to him. The judge also found that Kampen's

"will was not overborne by the circumstances of his incarceration nor his concern over the results of conviction in Florida; and . . . that [Kampen] knowingly, intelligently and voluntarily waived his Fifth Amendment rights guaranteed under *Miranda* and its progeny and his Sixth Amendment right to have his attorney present."

Upon completion of the interview Hudepohl and Kampen left the interview room and Kampen was permitted to speak briefly with Brant in the main control room. Hudepohl next informed Tiernan of Kampen's incriminating statement, and Tiernan promptly secured complaints against Kampen in the District Court of Norfolk for armed robbery, while masked, and assault with intent to murder. Tiernan and Detectives Fruci and Casey then left for Florida.

On the morning of February 15, 1978, Hudepohl returned to the Brevard County jail with Kampen's earlier taped statement, now transcribed. Kampen, still appearing calm and cooperative, signed the six page statement before a notary. Later that morning, Kampen and Brant were taken to the courthouse where new counsel were appointed to represent each of them, and they were arraigned on the Florida charges. Assistant District Attorney Tiernan and Officers Casey, Fruci and Hudepohl were in court during the arraignment of the defendants and knew that they were represented by counsel, Attorney Norwich having been appointed for Kampen and Attorney Cossaboom having been appointed for Brant. Further, the Massachusetts authorities and Hudepohl, by that time, had formed the intention to interrogate Brant later that day.

After their arraignment, Kampen and Brant were returned to jail. Later that afternoon they were brought into the jail interview room where Tiernan, Casey, Fruci and Hudepohl had assembled. At 4:57 P.M. Hudepohl turned on his tape recorder and began to read Brant his rights from a document entitled, "Brevard County Sheriff's Department Interrogation Preamble." This form contained the printed question, "Are you willing to proceed without an at-

torney being present to represent you?" This question was followed by a blank space for the answer of the person being interviewed. When Hudepohl read this question to Brant, Brant replied, "No." Hudepohl wrote this response on the form and confirmed that Brant refused to answer any further questions without his counsel being present. One of the Massachusetts authorities then interjected the fact that Kampen had already made a statement to the police, and Hudepohl confirmed to Brant that this was so and that Kampen's statement had already been signed and notarized. The motion judge found that the authorities, in using these words and conduct, "hoped and expected" that Brant would make a further statement. Hudepohl then turned off the tape recorder.

Kampen remarked that his statement was "all lies," and Brant asked for a moment to speak with Kampen privately. He was afforded this privilege. Fourteen minutes after the interrogation had ceased, Brant and Kampen returned to the interview room and Brant asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied, directing Brant's attention to the interrogation preamble, specifically the question of Brant's willingness to proceed without an attorney being present to represent him. Brant himself crossed out the response, "No," wrote in, "Yes," and signed his name, indicating his willingness to give a statement without his attorney being present. Brant indicated that he had changed his mind about giving a statement of his own free will, without any threats or promises.

Although Brant stated he wished to make a statement, further proceedings followed a question and answer format, Hudepohl asking Brant certain questions and Brant responding. At one point Kampen volunteered a response when Brant hesitated, or seemed uncertain, and one of the Massachusetts authorities began to follow up Kampen's response. Hudepohl then specifically reminded Kampen of his Miranda rights, and asked him expressly, "In light of all that, do you still wish to talk to us without having an attor-

ney here, or your attorney of record here in Brevard County?" Kampen responded, "Yeah." Thereafter both Brant and Kampen were asked further questions and responded thereto. Both Kampen's and Brant's statements were incriminating, the statements virtually amounting to a confession to the Massachusetts offenses.

On Friday morning, February 17, 1978, the statements made on the 15th having been transcribed, Kampen and Brant were given an opportunity to read the twenty page transcription of their joint statement. Both defendants read the joint statement, initialed each page, and then executed an affidavit stating that the facts set forth therein were "true and correct." Later that day, Kampen and Brant were returned to court where, on the advice of their appointed counsel, who were present, they each waived extradition to Massachusetts, agreeing voluntarily to return and face the Massachusetts charges.

Kampen and Brant were delivered into the custody of the Massachusetts authorities on the morning of February 18, 1978. Brant seemed happy to be returning to Massachusetts. Both defendants were observed to be in complete control of their faculties. Handcuffed, each defendant was placed in the back seat of an automobile where they were joined by Detective Casey. Detective Fruci and District Attorney Tiernan sat in the front seat, Tiernan driving. On the way to the airport, there was casual conversation among the three individuals in the back seat which included further inculpatory statements by Kampen and Brant.

The motion judge excluded the affidavits executed by the defendants, as well as a portion of the twenty page transcription of their joint statement. He also excluded from evidence the admissions made by the defendants while riding to the airport in the automobile. He denied Brant's motion to suppress the entire twenty page statement, and most of it was received in evidence. The judge stated that each of the various incriminatory statements made by the defendants was made "intelligently, knowingly and voluntarily,

free of coercion and without the will of either defendant being overborne in any respect."

1. This case is a close one, but nevertheless we think reversal of the defendant's conviction is required. The defendant first argues that his Sixth and Fourteenth Amendment right to counsel was violated, in that the authorities deliberately contrived to elicit incriminating information from him in the absence of his counsel. See *Massiah* v. *United States*, 377 U.S. 201, 206 (1964). While it is clear that the police and prosecutor here arranged a questioning session with the defendant, apparently without notifying his Florida-appointed attorney, we think we need not consider this aspect further, because consideration of the Miranda Fifth Amendment principle is dispositive.

Once warnings have been given (as they were here) the subsequent procedure is clear: If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. *Miranda* v. *Arizona*, 384 U.S. 436, 474 (1966). The rule is that the defendant's decision to cut off questioning must be "scrupulously honored." *Miranda*, *supra* at 474, 479. The defendant's rights were not so honored here.

After the defendant stated his decision to remain silent and that decision had been noted in writing, one of the Massachusetts authorities interjected the fact that Kampen had already made a statement to the police. A Florida officer confirmed that this was so and that Kampen's statement had already been signed and notarized. The defendant then conferred privately with Kampen for fourteen minutes. He then stated his willingness to proceed without an attorney present to represent him, and he made a written notation confirming that fact. Then the defendant made his inculpatory statements.

We first consider whether Brant was subjected to "interrogation," within the meaning of *Miranda*, after he had invoked his privilege to remain silent. We conclude that he was interrogated. Not all statements obtained by the police after a person has been taken into custody are to be consid-

ered the product of interrogation. "Any statement given freely and voluntarily without any compelling influences is, of cou[illegible], admissible in evidence." *Miranda, supra* at 478. A "compelling influence" is not necessarily in the form of express questions. The inquiry here is whether the authorities used any words or actions, other than those normally attendant to arrest and custody, that they should have known were reasonably likely to elicit an incriminatory response from the suspect. *Rhode Island* v. *Innis*, U.S. , (1980).[c] The test is an objective one. Thus where, as in this case, the motion judge found that the authorities "hoped and expected" that the defendant would change his mind and make a statement as a result of the authorities' further statements and their permitting the private interview between Brant and Kampen, the intent of the authorities is not conclusive. Nevertheless, their intent bears on whether they should have known that their words and actions were likely to evoke an incriminating response. Since the motion judge found, as warranted by evidence produced at the hearing on the motion to suppress, that their words and conduct were designed to elicit an incriminating response from Brant, it is indicative that the practice was one which they should have known was reasonably likely to have the effect. *Id.* at n.7.[d] We conclude that the defendant was "interrogated" by the authorities in violation of his undisputed rights under *Miranda* to remain silent.

The Commonwealth here relies upon *Michigan* v. *Mosley*, 423 U.S. 96 (1975), wherein the Supreme Court held that, in the circumstances of that case, a second interrogation of the defendant, although made after he had invoked his right to cut off questioning, nevertheless resulted in admissible inculpatory evidence against the defendant. In *Commonwealth* v. *Taylor*, Mass. , - (1978),[e] we summarized the significant holdings of *Mosley* as follows: "In

[c] 48 U.S.L.W. 4506, 4509 (May 12, 1980).

[d] 48 U.S.L.W. at 4509 n.7.

[e] Mass. Adv. Sh. (1978) 394, 402-403.

Mosley, the Supreme Court explored the question whether and in what circumstances the prosecution is prohibited from using a defendant's in-custody statement obtained after the right to remain silent has been invoked. The Court viewed resolution of the question as turning almost entirely on an interpretation of the *Miranda* language quoted above. It considered the 'critical safeguard' identified in the *Miranda* passage to be a person's 'right to cut off questioning.' *Michigan* v. *Mosley*, *supra* at 103. 'Through the exercise of his option to terminate questioning he can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation. The requirement that law enforcement authorities must respect a person's exercise of that option counteracts the coercive pressures of the custodial setting.' *Id.* at 103-104. The Court then concluded, as correctly noted by the judge in the present case, that *Miranda* mandated that the admissibility of any statements obtained after the person in custody has decided to remain silent depended on whether the person's '"right to cut off questioning" was "scrupulously honored."' *Id.* at 104. See *Commonwealth* v. *Dustin*, 373 Mass. 612, 616 (1977) [cert. denied, 435 U.S. 943 (1978)]; *United States* v. *Olof*, 527 F.2d 752, 754 (9th Cir. 1975). In concluding that the defendant's right to cut off questioning *was* scrupulously honored, and, consequently, that his Miranda rights had not been violated, the Court in *Mosley* stressed that after the defendant initially stated he wished to remain silent, the police had immediately ceased interrogation. Questioning was resumed 'only after the passage of a significant period of time and the provision of a fresh set of warnings,' and the second interrogation was restricted 'to a crime that had not been a subject of the earlier interrogation.' *Id.* at 106."

Mosley is clearly distinguishable from this case. Interrogation here was not cut off when the defendant asserted his rights. On the contrary, statements were made by the authorities which were intended to overcome the defendant's resistance to interrogation, and even the respite of fourteen

minutes, unlike the similar interval in *Mosley*, and the permitted discussion with Kampen were aimed at the same purpose. *Rhode Island* v. *Innis*, *supra*, is also distinguished from this case, in that the Supreme Court there held that a conversation between police officers, although it was overheard by the defendant in that case and may have had a "subtle compulsion" which caused him to make admissions after he had asserted his right to remain silent, was not "interrogation" within the meaning of *Miranda*. *Id.* at .[f] Logic does not permit such a result in the instant case, where the authorities achieved the result (admissions by the defendant) which they hoped and intended from their conduct and words.

The result we reach here is supported by our reasoning in two recent cases. *Commonwealth* v. *Watkins*, Mass. (1978),[g] and *Commonwealth* v. *Taylor*, Mass. (1978).[h] In *Watkins*, the suspect asked for an attorney while being questioned in a Kentucky police station by Massachusetts officers. The questioning continued for some moments but stopped when the suspect said a second time that he wanted an attorney. The suspect was allowed to call an attorney, but instead called and spoke to his mother and sister. Thereafter he said he was ready to make a statement, and a further incriminating statement was taken. Although the statement before Watkins' telephone call was suppressed, this court affirmed the admissibility of the statements after the call because "the defendant's spontaneous declaration of his desire to make a further statement constituted an implied, if not an express, waiver of his previously asserted desire to speak with counsel . . . ." *Id.* at .[i]

The facts in the *Taylor* case are readily distinguishable because the police initiated the defendant's admissions by showing him a wanted poster and telling him his finger-

[f] 48 U.S.L.W. at 4509.

[g] Mass. Adv. Sh. (1978) 1646.

[h] Mass. Adv. Sh. (1978) 394.

[i] Mass. Adv. Sh. (1978) at 1663.

prints were found at one crime scene, in an apparent effort to get a statement from him only five minutes after he told the police in his attorney's presence that he did not wish to say anything. *Id.* at - .[1] The instant case is closer in facts to *Taylor* than to *Watkins*. Although Brant himself sought the interview with Kampen, that is not significant, for the impetus for this request clearly came from the police statements immediately after Brant asserted his right to remain silent.

Implied in the motion judge's findings of fact, and in the Commonwealth's argument, is the premise that Brant may well have been motivated to change his mind and to make his inculpatory statements by his desire to return to Massachusetts for prosecution and thus avoid Florida prosecution and the danger of sexual assaults in prison. We assume such reasoning on his part was possible, but we also have in mind that the burden was on the Commonwealth to establish that the defendant knowingly and intelligently waived his privilege against self-incrimination. *Miranda, supra* at 475. Viewed in light of this burden, it is clear that suggestions of motivations unrelated to the authorities' statements rest in conjecture. Rather we have a case in which the defendant's rights were not scrupulously honored, as required by law. It is also a case where the "cat-out-of-the-bag" aspect became acutely significant when Brant, in the face of his assertion that he wanted his attorney present — an attorney who undoubtedly could have explained the evidentiary significance of Kampen's statement as it related to Brant —, was instead subtly turned toward an inculpatory statement.

Contrary to the Commonwealth's argument, nothing that we have said has the effect of establishing a per se proscription on further questioning after a defendant has once asserted his right to remain silent. Nor, in the circumstances of this case, have we impugned the results or the reasoning in those cases principally relied upon here by the Commonwealth, viz: *Mosley, supra* and *Watkins, supra*.

[1] Mass. Adv. Sh. (1978) at 396-397.

2. We discuss the second assignment of error urged by Brant against the possibility that the issue may arise at any new trial of this indictment. Brant asserts that the trial judge erred by allowing the assistant district attorney to argue to the jury that Brant had made no response when his codefendant had made certain statements to law enforcement authorities, and by instructing the jury that they could consider that failure to be an admission on the part of Brant. The Commonwealth argues that Brant had waived his right to remain silent and consequently could not rely on that right. Further, the Commonwealth argues that, if there was error, it was harmless, in view of Brant's detailed admissions in the twenty page statement in which he and Kampen joined. Assuming that the Commonwealth's arguments would be correct if the twenty page statement had been admitted, it is also true that when the statement is excluded at any new trial, the silences of Brant during Kampen's recitals will not be admissible evidence or a proper subject of argument. *Doyle* v. *Ohio*, 426 U.S. 610 (1976). *Commonwealth* v. *Grieco*, 5 Mass. App. Ct. 350 (1977). *Commonwealth* v. *Bennett*, 2 Mass. App. Ct. 575, 580 (1974).

3. The twenty page statement of Brant, and all evidence of admissions by him at the Florida interview, should have been excluded as obtained in violation of his rights under the Fifth Amendment of the Constitution of the United States. Consequently the judgment is reversed, the verdict set aside and the case remanded to the Superior Court for a new trial.

So ordered.

MASS. APP. CT. ADV. SH.

COMMONWEALTH vs. JEFFREY A. BRANT.

Norfolk. May 15, 1979. - October 31, 1979.
Present: Keville, Brown & Dreben, JJ.

Evidence, Admissions and confessions. Constitutional Law, Admissions and confessions, Waiver of constitutional rights, assistance of counsel. Waiver. Practice, Criminal, Charge to jury, Comment by prosecutor.

Indictment found and returned in the Suprerior Court on February 27, 1976.

A motion to suppress was heard by Young, J., and the case was tried before Linscott, J.

Thomas P. McCusker, Jr., for the defendant. Charles J. Hely, Assistant District Attorney, for the Commonwealth.

KEVILLE, J. On December 28, 1977, a clerk employed in a market located in Norwood was held up by two armed men who were masked. In the course of the robbery the clerk was shot and seriously wounded. The robbers fled and were not then apprehended. On February 4, 1978, the defendant, Jeffrey A. Brant, and Neil

Kampen, Jr. were arrested in Titusville Florida, after a high speed chase in which shots were exchanged with police.

Brant appeals pursuant to G.L. c. 278, §§ 33A-33G, from his conviction after a jury trial on an indictment arising out of the Norwood incident charging him with armed robbery while masked.[1] Brant argues two assignments of error on appeal.

He asserts error in the denial of his pretrial motion to suppress an incriminating statement made by him to police in Florida following his arrest which virtually amounted to a confession to the Massachusetts indictment. He also contends that the trial judge erred in permitting the prosecutor to argue to the jury that Brant had made no response to

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[1] His companion, Kampen, pleaded guilty following his indictment for the same offense.

certain statements made by Kampen to the authorities and that the judge erred in instructing the jury that they would consider that failure to be an admission by Brant.

1. Motion to Suppress.

Whether the judge erred in denying Brant's motion to suppress turns on the resolution of two questions: whether the police scrupulously honored Brant's right to cut off questioning after he declined to be questioned without his lawyer being present, and whether his subsequent waiver of his right to remain silent was voluntarily and intelligently given. While the answers to these questions, as the motion judge acknowledged, are not free of difficulty, we conclude that there was no error.

In reviewing the judge's findings of fact and rulings of law on the motion to

suppress, we accept his resolution of conflicting testimony. His subsidiary findings are not to be disturbed if warranted by the evidence. Commonwealth v. Watkins, 375 Mass. , (1978).[a/] However, ultimate findings and conclusions of law, particularly those of constitutional dimension, are subject to independent review on appeal. Commonwealth v. Mahnke, 368 Mass. 662, 667 (1975), cert. denied, 425 U.S. 959 (1976).

We summarize pertinent facts drawn from the judge's findings which are supported by the evidence taken at the hearing on the motion to suppress. On February 5, the day following their arrest, Brant and Kampen were brought to court for a probable cause hearing and to fix bail on certain Florida charges. They were represented by a

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a/Mass. Adv. Sh. (1978) 1646, 1651

Florida public defender. They were lodged in a county jail in separate cell blocks and could not communicate with each other.

On February 13 a court order relieved the public defender from representing Brant and Kampen.[2] On that day an assistant district attorney of Norfolk County, Tiernan, requested by phone of a Florida deputy sheriff, Hudepohl (who appears to have been in charge of these prisoners), that Hudepohl interview Brant and Kampen concerning the robbery in Norwood. On February 14 Hudepohl interviewed Kampen and informed him of the call from Massachusetts. He stated that he wished to obtain Kampen's side of the story and that he would not inquire about the Florida

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[2] There appeared to be a conflict of interest between these defendants and a juvenile who was apprehended with them and represented by the same attorney.

charges. Hudepohl carefully informed Kampen of his Miranda rights and ascertained that he understood them. Kampen replied "Yes" to Hudepohl's question "Do you wish to talk with me now without a lawyer?" Kampen then gave the Sheriff an inculpatory statement which was recorded on tape and on the following day was transcribed, signed by Kampen and notarized. At the close of the invterview Kampen was permitted to talk briefly with Brant.[3/]

Kampen's inculpatory statement was communicated to Tiernan who promptly secured complaints against him in

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3/Omitted from the judge's findings but included in the transcript of the motion to suppress was the indication that, prior to his interrogation by the authorities, Brant had already discussed with Kampen the possibility of making a "deal" to return to Massachusetts and thus avoid the prospect of incarceration in Florida.

Massachusetts for armed robbery while masked and for assault with intent to murder and then left for Florida with two police officers. The judge found that Kampen knowingly, intelligently and voluntarily waived his Fifth Amendment rights guaranteed under Miranda v. Arizona, 384 U.S. 436 (1966) and his Sixth Amendment right to have his attorney present.

On February 15 Kampen and Brant, new and separate counsel having been appointed to represent each of them, were arraigned on the Florida charges.[4/] The

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[4/]The record on appeal is bare as to what, if any advice was given to Brant by his court appointed counsel save for the fact that on February 17 Brant was returned to court where, on the advice of counsel, who was present, he waived extradition proceedings and agreed voluntarily to return here to face the Massachusetts charges. The motion judge found that there was no suggestion that Brant was prevent from communicating with his attorney at any time.

Massachusetts officials and Hudepohl were present in court at the arraignment and knew that Brant and Kampen were represented by counsel. They intended to interrogate Brant later that day. That afternoon Brant and Kampen were brought to an interview room in the jail, where the Massachusetts officials and Hudepohl had gathered. Hudepohl turned on a tape recorder and began to read to Brant his rights from a document entitled "Brevard County Sheriff's Department Interrogation Preamble". Included therein was the question, "Are you willing to proceed without an attorney being present to represent you?" In the document this question is followed by a blank space for the response of the person being interviewed. When Hudepohl read the question to Brant, Brant replied "No". Hudepohl then wrote that response on the

document.[5] One of the Massachusetts

5/ BREVARD COUNTY SHERIFF'S DEPARTMENT INTERROGATION PREAMBLE

I, _____ am aware that I am (under arrest) or (suspect) (for Armed Robbery while Masked and attempted murder). I have been advised and have had explained to me that prior to answering any questions or making any statement either oral or written that I am entitled to be represented by legal counsel (lawyer). I have also been advised that if I am without funds with which to secure counsel, the State of Florida will furnish me with an attorney. It has also been explained to me that any statement I make or question that I answer must be free and voluntary, without threat of punishment or promise of reward. I am aware that I have the right to remain silent and not bear witness against myself as guaranteed by the Constitution of the United States of America. It has also been explained to me that any statement made by me, either oral or written, can and will be used as evidence against me in Court.

It has also been explained to me that I may have an attorney present to represent me now or at any time during this interview and interrogation.

I understand that this interview and interrogation can and will be terminated at any time upon my request.

Q. Are you willing to proceed without an attorney being present to represent you?
A. _____

Signed _____

officials then mentioned the fact that Kampen had already given a statement to the police. Hudepohl stated that this was so and that Kampen's statement had been signed and notarized. Hudepohl then turned off the tape recorder. At that juncture, Kampen remarked that his statement was "all lies." Brant then requested a moment to speak with Kampen privately. The request was granted.6/

Fourteen minutes later Brant and Kampen returned to the interview room. Brant asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied with his request and again directed Brant's attention to the interrogation preamble and specifically to

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6/The judge found that in permitting Brant to speak with Kampen the police "hoped and expected that Brant would change his mind and make a statement."

the question of Brant's willingness to proceed without an attorney being present to represent him. Brant himself crossed out the earlier response "No", wrote in "Yes", and signed his name indicating his willingness to make a statement without his attorney being present.

There followed questions by Hudepohl and answers by Brant. At some point, Kampen volunteered a response to a question and one of the Massachusetts officials joined the dialogue. At this point, Hudepohl reminded Kampen of his Miranda rights, ascertained that he understood them and obtained an affirmative answer when he asked Kampen whether he still wished to talk without having his attorney present. Other questions to Brant and Kampen followed with their responses, the latter virtually amounting to confessions to the

Massachusetts offenses.[7/]

Contrary to Brant's assertion, we cannot say that the judge erred in his conclusion that Brant's right to cut off questioning was scrupulously observed when, on February 15, having indicated that he did not wish to be questioned without his attorney being present, he was informed that Kampen had given a signed statement to the police. The judge was not confronted

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7/The judge suppressed those statements by Kampen which had been volunteered on February 15 prior to Hudepohl's obtaining from him an express waiver of counsel's presence. He also suppressed affidavits of Kampen and Brant which had been attached on February 17 to the transcription of their joint statement made on February 15, as well as certain statements made by Kampen and Brant to one of the Massachusetts officers while en route to the airport on February 18. He assigned as the basis for the suppression, in each of these instances, the Commonwealth's failure to prove that the defendants expressly or implicitly waived their rights to the assistance of counsel prior to making the statements and executing the affidavits.

here with an evaluation of police conduct such as that in Commonwealth v. Jackson, Mass. , (1989),[b] where a suspect's statement was induced by a deliberate false representation that the suspect's girlfriend had implicated herself in the crime, or that in Commonwealth v. Taylor, 374 Mass. , (1978),[c] where subtle and persistent police persuasion induced an incriminating statement. See United States v. Olof, 527 F. 2d 752, 753 (9th Cir. 1975); Commonwealth v. Dustin, 373 Mass. 612, 615 (1977);[d] United States v. Davis, 527 F. 2d 1110, 1111 (9th Cir. 1976); Blackmon v. Blackledge, 396 F. Supp. 296, 298-299 (W.D.N.C. 1975); United States Ex rel. Doss v. Bensinger, 463 F. 2d 576,

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[b] Mass. Adv. Sh. (1979) 401, 407

[c] Mass. Adv. Sh. (1978) 394, 396-397

[d] Mass. Adv. Sh. (1977) 2302, 2306.

578 (7th Cir. 1972). Compare United States v. Barnes, 432 F. 2d 89, 91 (9th Cir. 1970); Commonwealth v. Andujar, 7 Mass. App. Ct. , (1979).[e/] Compare also Commonwealth v. Watkins, 375 Mass. , (1978),[f/] where a defendant's statements made immediately following his initial request for counsel were suppressed because detectives continued to question him until he made a second request to see a lawyer.

The judge found that, following Brant's response that he did not wish to proceed without his attorney being present, the police did not further solicit him or apply coercion or pressure. While, as the judge found, Brant's questioners "hoped and

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e/Mass. App. Ct. Adv. Sh. (1979) 1245, 1252.

f/Mass. Adv. Sh. (1978) 1646, 1663.

expected" that he would make a statement, no questioning of him followed the factual disclosure that Kampen had given the police a statement until Brant, having at his request been given an opportunity to confer with his companion, changed his mind and initiated the resumption of interrogation. Brant was then facing the prospect of criminal charges against him in two jurisdictions. It was obviously to his advantage, before responding to questions in regard to the Massachusetts charges, to know that his companion had given the police a statement and whether he had been implicated therein. Where an accomplice has in fact made an inculpatory statement to the police it is permissible and, as in this instance, it may be informative rather than coercive for the police to make that fact known to a suspect who has invoked his

right to cut off questioning in order that he may make a realistic evaluation of his position in light of the change in circumstances. Commonwealth v. Jackson, supra at n. 7.[9/] See Hill v. Whealon, 490 F. 2d 629, 631 (6th Cir. 1974). Compare United States v. Mearns, 443 F. Supp. 1244, 1253 (D. Del. 1978). Contrast United States v. Crisp, 435 F. 2d 354, 357 (7th Cir. 1970); United States v. Priest, 409 F. 2d 491, 493 (5th Cir. 1969).

The rule based upon the Fifth Amendment that, if a suspect indicates in any manner at any time prior to or during questioning that he wishes to cut off questioning, the interrogation must cease (Miranda v. Arizona, 384 U.S. 436, 473-474 [1966]) does not mean that questioning must cease

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[9/] Mass. Adv. Sh. (1979) at 411 n. 7.

forever. It permits renewal of interrogation in proper circumstances. The court in Michigan v. Mosley, 423 U.S. 96, 102 (1975), observed that a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of the circumstances, would transform the Miranda safeguards into wholly irrational obstacles to legitimate police investigative activity and deprive suspects of an opportunity to make informed and intelligent assessments of their interests."[8/]

Although Brant and Kampen conversed for not more than fourteen minutes before interrogation was resumed, that hiatus was

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8/The argument against an absolute rule with respect to silence has been held applicable equally to situations involving the right to counsel. Commonwealth v. Watkins, 375 Mass. , (1978) (Mass. Adv. Sh. [1978] 1646, 1662).

not insignificant in light of the facts that the conversation had been requested by Brant and that he had initiated the resumption of interrogation when he directed Hudepohl to turn the tape back on at the conclusion of their conversation. Contrast United States v. Mearns, supra at 1253; Commonwealth v. Taylor, 374 Mass. at . [h]

Bearing in mind the heavy burden which rests on the Commonwealth to demonstrate a voluntary, knowing and intelligent waiver, Hill v. Whealon, supra at 630, compare Commonwealth v. Jackson, supra at , [i] Commonwealth v. Dustin, 373 Mass. at 615, [i] we think that the judge was right

[h] Mass. Adv. Sh. (1978) at 397.

[i] Mass Adv. Sh. (1979) at 407.

[i] Mass. Adv. Sh. (1977) at 2306.

in his conclusion that Brant's spontaneous declaration of his desire to have the interrogation resumed constituted an effective waiver of his earlier declination to respond to questioning in the absence of his attorney. Commonwealth v. Watkins, 375 Mass. at .[k/]

2. Argument and Charge.

Brant next argues that the prosecutor made what amounted to constitutionally impermissible remarks in his closing argument which irreparably prejudiced Brant's right to a fair trial. Specifically, the defendant alleges that the prosecutor argued improperly in reminding the jurors that during the course of Brant's inculpatory statement to the authorities on February 15, statements were

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k/Mass. Adv. Sh. (1978) at 1663

made by Kampen which corroborated Brant's admissions and which were denied by Brant. Brant argues in essence that this allusion to Kampen's unchallenged statements compromised Brant's right to silence. Brant further argues that the trial judge compounded the problem in his instructions to the jury. The defendant's arguments lack merit.

The short answer to those contentions is that one cannot perserve what one has already waived. It is settled that extrajudicial accusatory statements made in a defendant's presence are not admissible as evidence against him where he is under arrest and maintains his right to silence, Commonwealth v. Locke, 335 Mass. 106, 115 (1956), and as a corollary, that the prosecutor is not permitted to allude to the defendant's silence, Commonwealth v. Egan, 357 Mass. 585, 591-592 (1970);

Commonwealth v. Morrison, 1 Mass. App. Ct. 632, 634 (1973). Here, however, Brant did not maintain his right to silence. Kampen's statements were made in the midst of those being made by Brant. Brant's "silence" occurred only while Kampen made statements which generally corroborated what Brant had just stated. Brant and Kampen, in effect, made a joint confession, and as such the statements were competent evidence. Commonwealth v. Brown, 121 Mass. 69, 80 (1876). Commonwealth v. Trefethen, 157 Mass. 180, 197-198 (1892). Commonwealth v. Lucas, 332 Mass. 594, 597 (1955). It follows that the prosecutor's reference to Kampen's statements in no way compromised Brant's right to silence which he had already relinquished. Contrast Commonwealth v. Bennett, 2 Mass. App. Ct. 575, 580 (1974). Furthermore, the judge's

instruction permissibly informed the jury that they could, in this context, infer from Brant's silence an admission of the truth of Kampen's statements, which, as we have observed, merely corroborated what Brant had already said. See Commonwealth v. Brown, supra at 80. See also State v. Cooley, 221 S.W. 2d 480, 485 (Mo. 1949).

Judgment affirmed.

BROWN, J. (dissenting). I respectfully dissent. I believe the motion judge misapplied the constitutional standards to the fact finding process from the start.[1/]

It seems to me that while the judge made passing application of the "scrupulously honored" standard, he in fact employed it interchangeably with "waiver" analysis. Not only is this mode of analysis, in my view, wrong, but it has provided a continual source of difficulty and confusion in the trial courts; consequently, our appellate courts' analyses of circumstances such as those

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1/Although a judge's subsidiary finding will not be disturbed if they are warranted by the evidence, "[o]ur appellate function requires that we make our own independent determination on the correctness of the judge's 'application of constitutional principles to the facts as found.'" Commonwealth v. Haas, 373 Mass. 545, 550 (1977) (Mass. Adv. Sh. [1977] 2212, 217).

presented here must in the future be more carefully defined. There is great need to address this important question, providing as much clarity as possible, because Miranda v. Arizona, 384 U.S. 436 (1966), and Michigan v. Mosley, 423 U.S. 96, 100 (1975), stand squarely for the proposition that even though a statement may eventually be volunteered,[2/] it is not admissible

[2/] Accord, Commonwealth v. Dustin, 373 Mass. 612, 616 (1977) (Mass. Adv. Sh., [1977] 2302, 2307), cert. denied, 435 U.S. 943 (1978). Although the facts in Dustin are different in part from the facts here, it is highly instructive to note the court's concluding remarks regarding suppressing evidence:

> The result is to exclude the defendant's statements from evidence, even though they were voluntarily made, even though they bear indicia of reliability, and even though they are found not to have been the produce of any intentional violation of constitutional standards. (Emphasis supplied.) Ibid.

It might be further stressed that in Dustin, unlike here, there was no intention exhibited by the police to influence the defendant to confess.

if the defendant's rights were not scrupulously honored. Therefore, the proper sequence of inquiry must be: first, and principally, did the police scrupulously honor the defendant's rights? The focus must be on the police's behavior and intent, not on the conduct of the defendant. Then, only after that question is answered in the affirmative, should we reach the question whether the defendant waived his rights. This issue is somewhat cloudy because Commonwealth v. Taylor, Mass. , - (1978)[a] employs the scrupulously honored standard; Commonwealth v. Jackson, Mass. , - (1979)[b]

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[a]Mass. Adv. Sh. (1978) 394, 402-405.

[b]Mass. Adv. Sh. (1979) 401, 408-414.

in fact employs that standard but also mentions in passing the waiver/voluntariness standard as though both were on equal footing; and[5] Commonwealth v. Watkins, Mass. , (1978),[c/] rests on waiver analysis. This court's decision in Commonwealth v. Andujar, Mass. App. Ct. , - (1979),[d/] implies that waiver is the "crucial issue."[3/]

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c/Mass. Adv. Sh. (1978) 1646, 1663.

d/Mass. App. Ct. Adv. Sh. (1979) 1245, 1254-1255.

3/Nevertheless, Taylor, Jackson, Watkins and Andujar, in sum, demonstrate that while police may resume interrogating a suspect after he has at an earlier time asserted his right to remain silent and his right to the assistance of counsel, they may do so only after some substantial intervening factor has occurred -- either the passage of time, in Mosely, 423 U.S. at 104-105, and Andujar, Mass. App. Ct. at (Mass. App. Ct. Adv. Sh. [1979] at 1250), it was a couple of hours, or, as in Watkins, Mass.

The motion judge here, understandably unsure of the proper standard, employed both the "scrupulously honoring" and the waiver standard, hence conflating constitutional principles which I believe must remain distinct.

Moreover, although the motion judge correctly recognized that the defendant's Sixth Amendment rights as well as his Fifth Amendment rights may have been violated, his interpretation of the legal principles applicable to such circumstances was, in my view, also erroneous. See e.g., Miranda v. Arizona, 384 U.S. at 444-445, 469-470, 474

FOOTNOTE CONTINUED
at (Mass. Adv. Sh. [1978] at 1653-1654), the opportunity to speak with one's lawyer -- which firmly demonstrates that the authorities scrupulously honored the suspects' right to immediately cut off questioning. Indeed, the Massachusetts cases are firm in announcing that under no circumstances may authorities avoid defendants' rights by attempting subtly to influence the defendant to "volunteer" a confession.

& n.44; Michigan v. Mosley, 423 U.S. at 104; Brewer v. Williams, 430 U.S. 387, 403-406 (1977). Cf. Oregon v. Hass, 420 U.S. 714 (1975) (implies that where suspect was told of his rights and asked for a lawyer, yet police questioning continued in violation of Miranda, the statements that resulted could not be used in the prosecution's case in chief). The decision in Commonwealth v. Taylor, Mass. at - [e/] provides the most illustrative guidance in circumstances such as the present. See United States v. Barnes, 432 F.2d 89, 91 (9th Cir. 1970). See also Commonwealth v. McKenna, 355 Mass. 313, 323-325 (1969); Commonwealth v. Murray, 359 Mass. 541, 545-546 (1971). But see Brewer v. Williams, 430 U.S. at 405-406.

[e/] Mass. Adv. Sh. (1978) at 405-406.

There is a critical difference between "scrupulously" honoring a suspect's rights after he has indicated a desire merely not to respond to questions by law enforcement officials and honoring his rights after he has indicated that he does not wish to answer any questions unless an attorney is present.[4/] See Brewer v. Williams, supra at 405 n. 10; Michigan v. Mosley, 423 U.S. at 104 n. 10 and at 109-110 (White, J., concurring in result). Cf. United States

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4/ The majority opinion apparently does not regard as relevant the fact that Brant initially asserted his right to speak with an attorney on the day he was arrested (February 4, 1978). I thus think it important to emphasize that the statements sought to be suppressed were made at a time when the defendant had indicated, as he had done at his first encounter with the authorities, that (as the judge found) he was not "willing to proceed without an attorney being present to represent him." See Massiah v. United States, 377 U.S. 201, 206 (1964); Brewer v. Williams, 430 U.S. at 400-401. See also Commonwealth v. Murray, 359 at 545.

v. Massimo, 432 F. 2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), cert. denied, 400 U.S. 1022 (1971). See also Miranda v. Arizona, 384 U.S. at 474 ("the interrogation must cease until an attorney is present").

Here, unlike Commonwealth v. Watkins, Mass. at ,[f] the motion judge found that the defendant "already had an attorney appointed to represent him" (compare Commonwealth v. Williams, Mass. , & n.9 and cases cited therein [1979][g] and the law enforcement officials knew this, as well as the attorney's name. Nevertheless, immediately following Brant's assertion of his rights they initiated a tactic "designed to undermine" his decision

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[f] Mass. Adv. Sh. (1978) at 1663.

[g] Mass. Adv. Sh. (1979) 1431, 1442 & n. 9.

(Commonwealth v. Jackson, supra at [h]/which, although not interrogation per se, when viewed in context is analogous to that conduct in Commonwealth v. Taylor, supra at [i]/which was proscribed for being a "subtle" attempt to get the defendant to talk.[5]/

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[h]/Mass. Adv. Sh. (1979) at 410.

[i]/Mass. Adv. Sh. (1979) at 399.

[5]/The judge found that on the morning of 15 February, Massachusetts authorities and agent Hudepohl were in court when Brant was arraigned and assigned a new attorney. At this time, having already secured a statement from Kampen, they nonetheless had formed an intention to interrogate Brant later that day, notwithstanding the fact that Brant and his attorney were before them, offering an opportunity for the authorities to apprise Brant and his attorney of their evidence and their intention. Later, when Brant unequivocally asserted his rights, the authorities nonetheless used as leverage information regarding Brant's codefendant's statement to influence Brant to talk. This might be readily inferred from the judge's finding

Although the majority opinion, in distinguishing this case from Taylor, correctly characterizes the proscribed police behavior in that case as "persuasion," it does not appreciate the full implications of Taylor. Taylor in fact stands for the proposition that subtle police behavior which manifests a desire to

FOOTNOTE CONTINUED
that the authorities' statements were "not without significance. . . [as] evidenced by the fact that Kampen immediately denied the veracity of his [own earlier] statement." Furthermore, according to the judge's findings the officials did not take Brant back to his cell after he exercised his rights, as was the case in Anduiar, Mass. App. Ct. at (Mass. App. Ct. Adv. Sh. [1979] ag 1247), and Mosley, 423 U.S. at 97-98, or afford him the opportunity to speak to his lawyer, as was the case in Watkins, Mass. at (Mass. Adv. Sh. [1978] at 1653-1654), but rather allowed him to go out into the hallway with the very person who had made a statement against him, which move they "hoped and expected" would influence Brant to "change his mind and make a statement."

encourage a defendant to relinquish his once-asserted rights is inconsistent with "scrupulously honoring" a suspect's rights. Consequently, I believe this case and Taylor are on all fours. Moreover, the reasoning in Jackson is in accord.

The judge specifically found here that "the police, in permitting Brant to speak with [the codefendant], hoped and expected that Brant would change his mind and make a statement." See United States v. Barnes, 432 F. 2d at 91. The majority conceded this point.[6/] See majority opinion n. 6,

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6/ Moreover, the larger picture, which uncontroverted government testimony vividly paints, adds further significance to the fact that the police "hoped and expected that Brant would change his mind and make a statement."

The record of the suppression hearing reflects that all witnesses said that "conversation" took place amongst the officials concerning their trip back to Massachusetts. This occurred while Brant was in the interrogation room, subsequent to his assertion of his rights and

supra.

There is no point in having a "right" to have an attorney present during interrogation[7] if law enforcement

FOOTNOTE CONTINUED
subsequent to "statements' made by the officials that his codefendant had already confessed. This fact is crucial in assessing the effect that such "statements" may have had on Brant, as well as the officials' intention in making them. We know from the judge's findings that Brant had heard that were he to go to prison in Florida he would be subjected to homosexual attacks. Indeed, Brant's eagerness to get out of Florida, as well as the authorities' awareness of that fact is readily apparent from the judge's findings and the transcript.

Viewed in this light, the officials, apprising Brant that his codefendant had already confessed cannot reasonably be seen as an attempt on their part to stand vigil over Brant's best interests. The overall picture demonstrates the contrary.

[7] It cannot be gainsaid that there are no other situations where an attorney's presence is more critical. See Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring and dissenting) ("any laywer worth his salt will tell the suspect in no uncertain terms to make no statements to police under any circumstances").

officials persist in attempting to obtain a statement during the temporary absence of appointed counsel, thereby causing the defendant to "waive" that right. See Michigan v. Mosley, 423 U.S. at 110 n. 2 (White, J. concurring in result). See generally Escobedo v. Illinois, 378 U.S. 478, 484-492 (1964).

Furthermore, I believe, as the motion judge impliedly ruled, that once counsel has been appointed, a showing of "waiver requires not merely comprehension by relinquishment." Brewer v. Williams, 430 U.S. at 404. No such showing has been made on this record. The subsidiary findings of the motion judge provide insufficient affirmative evidence that in this context the defendant freely relinquished his right

to counsel.[8] See Commonwealth v. Murray, 359 Mass. at 546.

While I would not find that the defendant's waiver was a "spontaneous declaration" (compare Commonwealth v. Watkins, Mass. at [1] or that it was permissible in this context for the law enforcement officials to tell the defendant that his codefendant had made an inculpatory statement (compare United States v. Barnes, supra; but see

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[8] "Warnings by law enforcement officers and subsequent action by the accused that might suffice to comply with Fifth Amendment strictures against testimonial compulsion would not necessarily meet what I regard as the higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment has attached." United States v. Massimo, 432 F. 2d 324, 327 (2d Cir. 1970) (Friendly, J., dissenting), cert. denied, 400 U.S. 1022 (1971). Accord, United States v. Satterfield, 558 F. 2d 655, 657 (2nd Cir. 1976).

[1] Mass. Adv. Sh. (1978) at 1663.

Commonwealth v. Jackson, Mass. at n. 7 [1979][k] both are to some degree beside the point because "the defendant had an attorney at the time he made the alleged statements." Commonwealth v. Williams, Mass. At .[l] Consequently, once Brant asserted his right to counsel all communication regarding the charges should have ceased unitl he was given a real opportunity to speak with his attorney.[9] I buttress this view with the additional facts that the defendant's attorney was known by name to the police, and that this

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k/Mass. Adv. Sh. (1979) at 411 n. 7.

l/Mass. Adv. Sh. (1979) at 1442.

9/It could persuasively be argued that all communications regarding the charges should go through the defendant's counsel. See S.J.C. Rule 3:22, Dr. 7-104(A)(1), 359 Mass. 820-821 (1972).

was not the initial confrontation, but an attempt to take up questioning (i.e., receive Miranda warnings) in circumstances where earlier no questioning had taken place because of Brant's request to speak with an attorney.[10] See Commonwealth v. Taylor, supra at ;[m] Michigan v. Mosley, 423 U.S. at 101 n.7. Cf. Commonwealth v. McKenna, supra at 324. Contrast Commonwealth v. Santo, Mass. , (1978)[n] (the defendant expressly stated that he did not want to speak to an attorney who had represented him in other actions). Contrast also Commonwealth v.

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[10] See note 4 supra.
[m] Mass. Adv. Sh. (1978) at 405-406.
[n] Mass. Adv. Sh. (1978) 1376, 1382-1383.

Watkins, supra at [o/] (where the defendant was indeed given an opportunity to call his lawyer; here the defendant was given an opportunity to speak with the very person who had inculpated him).

In sum, I disagree with the motion judge's interpretation of the relevant Federal and State decisions and with his application of them to the facts in the instant case. I am unable to find on this record that, after the defendant said initially that he wanted legal representation and would not make a statement in the absence of counsel and following the appointment of counsel, the defendant's rights to cut off questioning, especially his Sixth Amendment right, were

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o/Mass. Adv. Sh. (1978) at 1653-1654.

"scrupulously honored" in face of police behavior which manifested a desire to influence the defendant to talk after his counsel had departed. See United States v. Olof, 527 F. 2d 752, 753-754 (9th Cir. 1975); United States v. Barnes, supra; United States v. Rodriquez-Gastelum, 569 F. 2d 482, 488-489 (Goodwin, J., concurring and dissenting), & 589-591 (Hufstedler, J., dissenting) (9th Cir.), cert. denied 436 U.S. 919 (1978). See also in this regard Brewer v. Williams, 430 U.S. at 415 (Stevens, J. concurring), wherein the fundamental importance of counsel in safe-guarding the interests of both the accused and society is discussed. Justice Stevens emphasizes that when a client places his trust in counsel, and counsel in turn places his trust in law enforcement authorities, if authorities nonetheless

dishonor this trust and seek to influence the suspect to relinquish his rights outside of his lawyer's presence, both the individual and society suffer.

In sum, I think that the law enforcement officials did not "scrupulously honor" the defendent's right to cut off questioning, Michigan v. Mosley, 423 U.S. at 104, nor has the Commonwealth sustained its heavy burden of showing a knowing, intelligent, and voluntary waiver of that right. Miranda v. Arizona, 384 U.S. at 473-475. See Commonwealth v. Sires, 370 Mass. 541, 544 n. 2 (1976), and cases cited. Accordingly, the motion to suppress should have been allowed in full, and the defendant should have a new trial free from the tainted evidence.

As I believe that all the statements made by the defendant while in custody to

Florida law enforcement officials should not have been admitted in evidence, it goes without saying that testimony of police officers as to what he did not say is constitutionally proscribed.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
Nos.
71176-82

COMMONWEALTH

v.

NEIL H. KAMPEN, JR.

and

JEFFREY BRANT

FINDINGS, RULINGS and ORDER on DEFENDANTS' MOTIONS TO SUPPRESS

The defendants, Neil H. Kampen, Jr., and Jeffrey A. Brant, have each raised motions to suppress the various inculpatory statements which they made while in the custody of Florida or Massachusetts officials.

After a voir dire hearing, at which both defendants testified, the Commonwealth called Deputy Sheriff Hudepohl and Norwood

Police Detectives Casey and Fruci in rebuttal, and the parties introduced twenty (20) exhibits, I make the following findings and rulings:

The defendants were arrested in Titusville, Florida, after a high-speed automobile chase which involved the exchange of gunfire. Kampen's apprehension took place at approximately 7:00 a.m. on February 4, 1978. The defendants claim that they were physically assaulted by the arresting officers; but I do not so find, concluding rather that the police used only such force as was necessary to apprehend the fleeing defendants Kampen and Brant.

Kampen was booked at 9:30 a.m. and Brant, who had eluded his pursuers somewhat longer, was booked at 2:10 p.m. During the booking procedures, each was informed of his Miranda rights and each was specifically asked whether he wished to

call the Public Defender. Kampen said only that he would see the Public Defender in court that morning, while Brant requested and was permitted to call the public defender.

On Sunday, February 5, 1978, both Kampen and Brant were brought into court for a proceeding which, the parties stipulated, involved the setting of bail and a probable cause hearing on certain Florida charges. Brant concedes that he was offered an attorney at that time; but both deny that any attorney was present, representing them at that hearing. I find to the contrary, inferring from the Court records that the Florida Public Defender appeared at the February 5 hearing and represented Kampen and Brant (as well as others apprehended at the same time).

Following this hearing Kampen and Brant were held in custody at the Brevard

County Jail, one of a complex of buildings in the County seat, which included the Sheriff's Office and, across the street, the courthouse. Kampen and Brant were held in separate cell blocks, each of which housed approximately eight prisoners. The prisoners in each block could talk with each other, but apparently could not communicate with prisoners held in other cell blocks. Thus Kampen and Brant could not converse with each other. Other prisoners were housed in each of the cell blocks occupied by Kampen and Brant. And I infer that each of the defendants were told, in the "scuttlebutt" of the jail, that if they were convicted and sent to one of Florida's State Prisons they would be subject to homosexual assaults.

On February 13, 1978, the Florida Public Defenders' Office was relieved by Court Order from representing Kampen and

Brant due to a conflict of interest between these defendants and a juvenile apprehended with them. On that same day, Assistant District Attorney Arthur Tiernan telephoned Hudepohl and requested that he seek to interview Kampen and Brant concerning the incident which is the subject of the present indictments.

On February 14, 1978, Hudepohl arrived at the courthouse Sheriff's Department-Jail complex, left his police car for some maintenance work, and proceeded to the jail. He arrived sometime shortly before 10:00 a.m. and asked to have Kampen and Brant brought to him. Kampen arrived first and was taken by Hudepohl into a small interview room adjacent to the main control room of the jail. He first informed Kampen that he wished to interview him concerning certain Massachusetts offenses and told him that Tiernan had called, and said that he

wanted Kampen's side of the story. Hudepohl cautioned Kampen that he would not inquire about the Florida charges and carefully read him his Miranda rights, assuring after each question that Kampen understood. Hudepohl then asked Kampen, "Do you wish to talk with me now without a lawyer?" And Kampen said, "Yes." Kampen proceeded to give Hudepohl an inculpatory statement which, when transcribed, covered six pages.

I find that, at the time Kampen first spoke with Hudepohl, he was calm and collected and quite familiar with his Miranda rights, not only from his Florida experiences, but from earlier occasions on which those rights had been read to him. I also find that his will was not overborne by the circumstances of his incarceration nor his concern over the results of conviction in Florida; and I find that he

knowingly, intelligently and voluntarily waived his Fifth Amendment rights guaranteed under Miranda and its progeny and his Sixth Amendment right to have his attorney present.

Upon completion of the interview Hudepohl and Kampen left the interview room and Kampen was permitted to speak briefly with Brant in the main control room. Hudepohl next informed Tiernan of Kampen's incriminating statement; and Tiernan promptly secured complaints against Kampen in the District Court of Northern Norfolk for armed robbery, while masked, and assault with intent to murder. Tiernan and Detectives Fruci and Casey then left for Florida.

On the morning of February 15, 1978, Hudepohl returned to the Brevard County Jail with Kampen's earlier taped statement,

now transcribed; and Kampen, still appearing calm and cooperative, signed the six-page statement before a Notary. Later that morning, Kampen and Brant were taken to the courthouse where new counsel were appointed to represent each of them; and they were arraigned on the Florida charges. District Attorney Tiernan and Officers Casey, Fruci and Hudepohl were in court during the arraignment of the defendants and knew that they were represented by counsel, Attorney Norwich having been appointed for Kampen and Attorney Cossaboom having been appointed for Brant. Further, the Massachusetts authorities and Hudepohl, by that time, had formed the intention to interrogate Brant later that day.

After their arraignment, Kampen and Brant were returned to jail; and later that afternoon they were brought into the jail

interview room where Tiernan, Casey, Fruci and Hudepohl had assembled. At 4:57 p.m. Hudepohl turned on his tape recorder and began to read Brant his rights from a document entitled, "Brevard County Sheriff Department Interrogation Preamble," (Exhibit 11). This form, quite properly in view of the fact that Brant had already had an attorney appointed to represent him, asks specifically, "Are you willing to proceed without an attorney being present to represent you?" This question is followed by a blank space for the answer of the person being interviewed. When Hudepohl read this question to Brant, Brant replied, "No." Hudepohl wrote this response on the form and confirmed that Brant refused to answer any further questions without his counsel being present. One of the Massachusetts

authorities then interjected the fact that Kampden had already made a statement to the police; and Hudepohl confirmed to Brant that this was so and that Kampen's statement had already been signed and notarized. Hudepohl then turned off the tape recorder.

Kampen remarked that this statement was "all lies;" and Brant asked for a moment to speak with Kampen privately. He was afforded this privilege. Fourteen minutes after the interrogation had ceased, Brant and Kampen returned to the interview room and Brant asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied, directing Brant's attention to the interrogation preamble, specifically the question of Brant's willingness to proceed without an attorney being present to represent him.

Brant himself crossed out the response, "No," wrote in, "Yes," and signed his name, indicating his willingness to give a statement without his attorney being present. Brant indicated that he had changed his mind about giving a statement of his own free will, without any threats or promises.

Although Brant stated he wished to make a statement, further proceedings followed a question and answer format, Hudepohl asking Brant certain questions and Brant responding. At one point Kampen volunteered a response when Brant hesitated, or seemed uncertain; and one of the Massachusetts authorities commenced following up Kampen's response. Hudepohl then specifically reminded Kampen of his Miranda rights, ascertained that Kampen understood those rights, and asked him

expressly, "In light of all that, do you still wish to talk to us without having an attorney here, or your attorney of record here in Brevard County?" Kampen responded, "Yeah."

Thereafter both Brant and Kampen were asked further questions and responded thereto. Both Kampen's and Brant's statements were incriminating; the statements virtually amounting to a confession to the Massachusetts offenses.

On Friday morning, February 17, 1978, the statements made by Kampen and Brant on the 15th having been transcribed, they were given an opportunity to read the twenty-page transcription of their joint statement (Exhibit 10). Both defendants read the joint statement, initialed each page, and then executed an affidavit stating that the facts set forth therein were "true and correct." Later that day,

Kampen and Brant were returned to court where, on the advice of their appointed counsel, who were present, they each waived extradition to Massachusetts, agreeing voluntarily to return and face the Massachusetts charges.

Kampen and Brant were delivered into the custody of the Massachusetts authorities on the morning of February 18, 1978. Brant seemed happy to be returning to Massachusetts; but both defendants were observed to be in complete control of their faculties. Handcuffed, each defendant was placed in the back seat of an automobile where they were joined by Detective Casey. Detective Fruci and District Attorney Tiernan sat in the front seat, Tiernan driving. On the way to the airport, casual conversation among the three individuals in the back seat revealed that Detective Casey

was Brant's cousin. Kampen said that Brant "ought to get a break" due to this relationship. Sensing a willingness on the part of the defendants to discuss the case, Casey read them their Miranda rights from a Miranda card he carried, ascertained that they understood those rights, and asked if they were willing to talk. Both defendants answered in the affirmative and thereafter made further incriminating statements about both the Massachusetts and the Florida offenses.

1. The Defendants' Fifth Amendment Rights.

I find that each of the various incriminatory statements made by the defendants was made intelligently, knowingly and voluntarily, free of coercion and without the will of either defendant being overborne in any respect. The

inquiry does not end there, however, since, if law enforcement officers fail to give certain specified warnings before questioning a person in custody or fail to follow certain specified procedures during the course of interrogation, the statements made by the person in custody cannot, over his objections, be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary Michigan v. Mosley, 423 U.S. 98, 99-100 (1975). See Michigan v. Tucker, 417 U.S. 433, 443 (1974).

The first issue of concern is the length of time these defendants were held in custody prior to their making the incriminating statements at issue. While an unreasonably lengthy detention without arraignment may, in certain circumstances, prevent the authorities from claiming that

they "scrupulously honored" the rights of a suspect, (See Michigan v. Mosley, 423 U.S. 115, 119 n6 (Brennan, J., dissenting), this is not such a case. There is no suggestion that the timing of the defendants' interrogations related in any way to their court appearances or that the Florida Court appearances were delayed until such time as Hudepohl might question Kampen; nor is there any suggestion that either defendant was prevented from communicating with his attorney at any time. Indeed, the Titusville Police afforded both the defendants the opportunity to communicate with the Office of the Public Defender; and Brant availed himself of that opportunity. The length of time in custody which elapsed prior to the questioning here does not, standing alone, warrant suppression of these statements.

Brant, however, argues strenuously that his right to cutoff questioning was not "scrupulously honored." He points out that when he indicated that he did not wish to respond to questions in the absence of his attorney, he was at once reminded that his companion Kampen had given a signed statement to the police. That this comment was not without significance to the parties at that juncture is evidenced by the fact that Kampen immediately denied the veracity of his statement.

I find that the police, in permitting Brant to speak with Kampen, hoped and expected that Brant would change his mind and make a statement. (See U.S. v. Olof, 527 F. 2d 52, 754 (1975). Recognizing that Michigan v. Mosley does not establish a per se proscription against further questioning after a suspect has exercised his right to

cut off interrogation, Brant nevertheless argues that, on the authority of Commonwealth v. Taylor, Mass. Adv. Sh. (1978) 394, 400-407, the brief interval between interrogations (14 minutes), the fact that the second statement was about the same crime and was given to the same interrogators as were present during the first interrogation, when coupled with the fact that Brant's appointed counsel, known to the authorities, was not present, requires suppression of the second statement. See U.S. v. Clayton, 407 F. Supp. 204, 206-207 (E.D. Wisc. (1976). The Commonwealth counters, urging that since questioning was stopped promptly upon the exercise by Brant of his rights, and since no further questioning of any sort took place until <u>after</u> Brant himself expressed the desire to make a statement, after a break during which he consulted with

someone other than the interrogators, Brant's second statement ought not be suppressed, under Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1663.

The question is a close one. Both Taylor and Watkins depend upon a close reading of Michigan v. Mosely. The focus of the majority opinion in Michigan v. Mosley seems to be on reviewing police conduct which, if faulty, would appear to prevent further questioning; that is, if the police failed to scrupulously honor a suspect's right to cut off questioning, further interrogation after a break can be viewed as an effort to wear down the suspect's resistance and make him change his mind (Michigan v. Mosley at 105-106). At the same time, the Court characterized as "wholly irrational" a "blanket prohibition against the taking of voluntary

statements or a permanent immunity from further interrogation, regardless of circumstances" (Michigan v. Mosley, at 102). As I discern it, therefore, the teaching of Michigan v. Mosley, as expressed in Taylor and Watkins, is that, once a suspect has exercised his right to cut off questioning, the police must "scrupulously honor" that decision and must cease interrogation on that charge or that line of inquiry for some indefinite period of time; but that the suspect may himself choose to initiate further interrogation. Thus the suspect has it wholly within his control to decline to answer any further questions or to initiate further inquiry if he determines his interests are best served by so doing.

As in Watkins, I find that, once questioning of Brant had initially ceased,

the police did not further solicit him or apply any coercion or pressure on him, and I hold that in these circumstances Brant's spontaneous declaration of his desire to make a further statement constituted an implied, if not expressed (See PP. 1-2 of Exhibit 10) waiver of his previously asserted desire to speak with counsel, which waiver is permitted under the Miranda and the Mosley decisions. Commonwealth v. Watkins at 1663, but see U.S. v. Jakakas, 423 F. Supp. 564, 566-567 (E.D.N.Y. 1976).

I rule that adequate Miranda warnings were given prior to taking any of the incriminating statements in question; that the defendants' rights to cut off questioning were "scrupulously honored;" and that in view of my finding of voluntariness there appears no reason why any of the statements in question ought to be suppressed on Fifth Amendment grounds.

2. The Defendants' Sixth Amendment Rights.

The defendants next argue that their Sixth Amendment right to counsel was violated by their interrogation in the absence of counsel following counsel's appointment to represent them. The defendants rely most heavily on Brewer v. Williams, U.S. (1977) 45 USLW 4287. The defendants argue, and I agree, that their right to counsel attached at least as early as the February 5th probable cause hearing in the Florida Court. See Argersinger v. Hamlin, 40 7 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

Adversary proceedings had then commenced against the defendants in Florida; and I reject any formalistic notion that the appointment of Florida

attorneys on the Florida charges did not, at that time, call into play the defendants' rights to counsel on the Massachusetts charges as well. It is the essence of the attorney-client relationship that the client will reveal to the attorney all matters affecting his or her interest; and that the attorney, whatever the scope of his original engagement, ought have a complete background upon which to counsel his client. The proscription of DR7-104 (A)(1), and "ethical consideration" EC7-8 seem to me to require such an interpretation. Thus, in ascertaining Sixth Amendment rights I rule that the appointment of counsel on the Florida charges is the equivalent of the appointment of counsel on all pending charges against these defendants; and that, thereafter, adversary proceedings having

commenced against these defendants in Florida, they have a right to legal representation when the government interrogates them, Brewer v. Williams, 45 USLW, at 4291; and that "waiver requires not merely comprehension but relinquishment" (Brewer v. Williams, 45 USLW, at 4294). It is not enough, therefore, to simply read to a suspect his Miranda rights, thus reminding him of his right to the assistance of counsel. After Brewer, the correct rule, as I perceive it, requires further that the suspect expressly or implicitly indicate that he wishes to proceed with the questioning without his counsel being present. See U.S. v. Monti, 557 F. 2d 899, 904 (First Cir. (1977). (Suspect's derogatory comments about his counsel established his desire to go forward without counsel present).

In the instant case Hudepohl, in accordance with what appears to be a quite proper Brevard County Practice, carefully and repeatedly asked both Brant and Kampen expressly whether they wished to proceed without counsel being present. Indeed, on February 15, 1978, when Kampen began volunteering information during the interrogation of Brant, Hudepohl stopped the proceedings and, among other things, asked him specifically whether "You still wish to talk to us without having an attorney here or your attorney of record here in Brevard County." It is difficult to see how Hudepohl could have called more forcefully to Kampen's attention his right to have his appointed attorney present.

Despite Hudepohl's care, however, certain portions of the joint Brant-Kampen statement (Exhibit 10) must be suppressed

because no express or implicit waiver of counsel's assistance was obtained. Specifically, the answers provided by Kampen on pages 14 and 15 of Exhibit 10, which were volunteered prior to Hudepohl re-reading Kampen's rights to him and obtaining an express waiver of counsel's presence must be suppressed. For the same reason the affidavits of Kampen and Brant attached to Exhibit 10 as well as their initials on each page must be suppressed. These affidavits were executed and the initials affixed on February 17, 1978, when the transcribed statement was given to both defendants for review and signature.

The Commonwealth has failed to show that Kampen and Brant expressly or implicitly waived their right to the assistance of counsel at the time they executed these affidavits and initialed the

joint statement. Since the statement is a joint one and the affidavits indicate that each defendant adopts and admits as true and correct the admissions of the other, I rule that the signing and initialing on the morning of February 17 was a re-interrogation, inadmissible in evidence absent an express or implicit waiver of the assistance of counsel.

Of course, suppression of the affidavits and initials does not mean that the 20-page transcript itself is to be suppressed. Save for the remarks of Kampen on pages 14 and 15 thereof, it is not. Nor does this partial suppression permit the defendants at trial to raise any inference with the jury that the joint statement was not, in fact, reviewed and signed. Should any such inference be suggested, it will be open to the Commonwealth to introduce the

affidavits and initials for impeachment purposes since the suppression of the affidavits and initials "cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." (Harris v. New York, 401 U.S 222, 226 (1977), (Dissenting opinion of Brennan, J.); Commonwealth v. Harris, 364 Mass. 236, 239 (1973).

The statements given by Kampen and Brant to Detective Casey on the way to the airport must also be suppressed since the Commonwealth has failed to prove that the defendants expressly or implicitly waived their right to the assistance of counsel at the time of that interrogation. The Commonwealth introduced credible evidence that Casey properly read to the defendants their Miranda rights from his Miranda card

before discussing the substance of the offenses with them; but, unfortunately, the Miranda card was not introduced in evidence as suggested in Commonwealth v. Preston, 359 Mass. 268, 372 N.2 (1971). See Commonwealth v. Howard, Mass. App. Ct. Adv. Sh. (1976) 866, 868 n.3.

Miranda cards differ. The one carried by Officer Hudepohl and introduced in evidence (Exhibit 16) poses as its final question: "Do you wish to talk with us now without a lawyer?" Perhaps Officer Casey's card includes the same statement. Unfortunately, we do not know; and, in the absence of sufficient evidence that the defendants, not merely comprehended their Sixth Amendment right, but relinquished it, the statements to Officer Casey must be suppressed. (Brewer v. Williams, U.S. 45 USLW 4287, 4292.)

It follows that Kampen's motion to suppress must be allowed to the extent of suppressing his responses on page 14 and 15 of the transcript (Exhibit 10) and his signed affidavit and initials affixed thereto. His inculpatory statements to Officer Casey on the way to the airport are also suppressed. His motion is otherwise denied. Brant's motion to suppress likewise is allowed to the extent of suppressing his affidavit attached to Exhibit 10 and his initials on each page thereof, as well as his inculpatory statements to Officer Casey on the way to the Airport. His motion is otherwise denied.

BY ORDER OF THE COURT

JUSTICE OF SUPERIOR COURT

Entered: August 3, 1978

RECEIVED & FILED
Aug. 4, 1978
CLERK OF THE COURTS
NORFOLK COUNTY

RECEIVED
OCT 21 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 80-488

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1980.

COMMONWEALTH OF MASSACHUSETTS
Petitioner,

v.

JEFFREY A. BRANT
Respondent.

REPLY OF THE RESPONDENT, JEFFREY A. BRANT TO THE COMMONWEALTH OF MASSACHUSETTS PETITION FOR WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT PURSUANT TO RULE 46 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES ADOPTED APRIL 14, 1980 EFFECTIVE JUNE 13, 1980.

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The Respondent, Jeffrey A. Brant, prays that a Writ of Certiorari not issue to review the judgment of the Supreme Judicial Court of Massachusetts.

Opinions Below.

The opinion of the Supreme Judicial Court is reported at Mass. Adv. Sh. (1980) 1473, 406 N.E. 2d 1021. The opinion of the Appeals Court is reported at Mass. App. Ct. Adv. Sh. (1979) 2124, 395 N.E. 2d. 1320.

Statement of the Case.

The respondent was convicted of armed robbery while masked and sentenced to not less than eighteen years nor more than thirty years. Prior to trial he filed a motion to suppress statements as they were obtained in violation of his Constitutional rights. After a hearing, the motion was denied in part and the respondent excepted. A three judge panel of the Appeals Court found no error, however, Judge Brown, of that panel, filed a dissent to the majority opinion of the Appeals Court wherein he stated that he believed the Motion Judge misapplied the Constitutional standards to the fact finding process from the start. See Petitioner's Appendix B, pages 35 (a) through 54(a).

The defendant Brant then made application to the Supreme Judicial Court for leave to obtain further appellate review. This leave was granted and the Supreme Judicial Court reversed the judgment on the basis that all statements and admissions "should have been excluded as have been excluded as obtained in violation of his rights under the Fifth Amendment of the Constitution of the United States" Commonwealth V. Brant, Mass. Adv. Sh. (1980) 1473, 1484; 406 N.E. 2d 1021 (Petitioner's App. A).

Statement of Facts.

The Respondent, Jeffrey A. Brant, relies upon the findings of fact by Judge Young, who heard and decided the Motion to Suppress and filed Findings of Fact. They are appended hereto as Appendix A.

The Reasons for Denying Review.

I.

The decision of the Supreme Judicial Court for the Commonwealth of Massachusetts in the case of Commonwealth V. Jeffrey Brant follows settled Constitutional law in this area. The Supreme Judicial Court has followed the precepts set forth by decisions of the United States Supreme Court in Miranda V. Arizona, 384 U.S. 436 (1966), Michigan V. Mosley, 423 U.S. 96 (1975), and Rhode Island V. Innis, ___ U.S. ___ 100 S. Ct. 1689 (1980).

The Supreme Judicial Court of Massachusetts has also followed its own case law as set forth in Commonwealth V. Taylor, 78 Mass. Adv. Sh. 394; 374 NE. 2d 81 (1978).

II.

The decision of the Supreme Judicial Court of the Commonwealth of Massachusetts in the Brant case does not set forth a per se proscription against further questioning by the police once a defendant expresses a desire for an attorney but instead has followed the settled case law as set forth in the cases cited above.

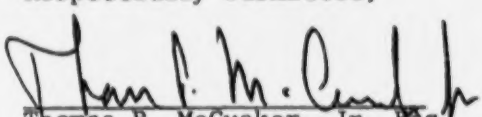
III.

It is the Respondent Brant's position that the decision of the Supreme Judicial Court in reversing Brant's conviction was not based on an application of Rhode Island V. Innis, ___ U.S. ___ 100, S. Ct. 1682 (1980) and it is further his position that the decision does not constitute a new constitutional rule of criminal procedure and further the petitioner's argument of retroactive application need not be considered by the Court.

Conclusion.

For the reasons stated above the respondent, Jeffrey A. Brant, submits that a Writ of Certiorari should not be granted.

Respectfully submitted,



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APPENDIX A.

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, SS.

SUPERIOR COURT
Nos.
71176-82

COMMONWEALTH

V.

NEIL H. KAMPEN, JR.

and

JEFFREY BRANT

FINDINGS, RULINGS and ORDER on DEFENDANTS' MOTIONS TO SUPPRESS

The defendants, Neil H. Kampen, Jr., and Jeffrey A. Brant, have each raised motions to suppress the various inculpatory statements which they made while in the custody of Florida or Massachusetts officials.

After a voir dire hearing, at which both defendants testified, the Commonwealth called Deputy Sheriff Hudepohl and Norwood Police Detectives Casey and Fruci in rebuttal, and the parties introduced twenty (20) exhibits, I make the following findings and rulings:

The defendants were arrested in Titusville, Florida, after a high-speed automobile chase which involved the exchange of gunfire. Kampen's apprehension took place at approximately 7:00 a.m. on February 4, 1978. The defendants claim that they were physically assaulted by the arresting officers; but I do not so find, concluding rather that the police used only such force as was necessary to apprehend the fleeing defendants Kampen and Brant.

Kampen was booked at 9:30 a.m. and Brant, who had eluded his pursuers somewhat longer, was booked at 2:10 p.m. During the booking procedures, each was informed of his Miranda rights and each was specifically asked whether he wished to call the Public Defender. Kampen said only that he would see the Public Defender in court that morning, while Brant requested and was permitted to call the public defender.

On Sunday, February 5, 1978, both Kampen and Brant were brought into court for a proceeding which, the parties stipulated, involved the setting of bail and a probable cause hearing on certain Florida charges. Brant concedes that he was offered an attorney at that time; but both deny that any attorney was present, representing them

at that hearing. I find to the contrary, inferring from the Court records that the Florida Public Defender appeared at the February 5 hearing and represented Kampen and Brant (as well as others apprehended at the same time).

Following this hearing Kampen and Brant were held in custody at the Brevard County Jail, one of a complex of buildings in the County seat, which included the Sheriff's Office and, across the street, the courthouse. Kampen and Brant were held in separate cell blocks, each of which housed approximately eight prisoners. The prisoners in each block could talk with each other, but apparently could not communicate with prisoners held in other cell blocks. Thus Kampen and Brant could not converse with each other. Other prisoners were housed in each of the cell blocks occupied by Kampen and Brant. And I infer that each of the defendants were told, in the "scuttlebutt" of the jail, that if they were convicted and sent to one of Florida's State Prisons they would be subject to homosexual assaults.

On February 13, 1978, the Florida Public Defenders' Office was relieved by Court Order from representing Kampen and Brant due to a conflict of

interest between these defendants and a juvenile apprehended with them. On that same day, Assistant District Attorney Arthur Tiernan telephoned Hudepohl and requested that he seek to interview Kampen and Brant concerning the incident which is the subject of the present indictments.

On February 14, 1978, Hudepohl arrived at the courthouse Sheriff's Department-Jail complex, left his police car for some maintenance work, and proceeded to the jail. He arrived sometime shortly before 10:00 a.m. and asked to have Kampen and Brant brought to him. Kampen arrived first and was taken by Hudepohl into a small interview room adjacent to the main control room of the jail. He first informed Kampen that he wished to interview him concerning certain Massachusetts offenses and told him that Tiernan had called, and said that he wanted Kampen's side of the story. Hudepohl cautioned Kampen that he would not inquire about the Florida charges and carefully read him his Miranda rights, assuring after each question that Kampen understood. Hudepohl then asked Kampen, "Do you wish to talk with me now without a lawyer?" And Kampen said, "Yes." Kampen proceeded to give Hudepohl an inculpatory statement which,

when transcribed, covered six pages.

I find that, at the time Kampen first spoke with Hudepohl, he was calm and collected and quite familiar with his Miranda rights, not only from his Florida experiences, but from earlier occasions on which those rights had been read to him. I also find that his will was not overborne by the circumstances of his incarceration nor his concern over the results of conviction in Florida; and I find that he knowingly, intelligently and voluntarily waived his Fifth Amendment rights guaranteed under Miranda and its progeny and his Sixth Amendment right to have his attorney present.

Upon completion of the interview Hudepohl and Kampen left the interview room and Kampen was permitted to speak briefly with Brant in the main control room. Hudepohl next informed Tiernan of Kampen's incriminating statement; and Tiernan promptly secured complaints against Kampen in the District Court of Northern Norfolk for armed robbery, while masked, and assault with intent to murder. Tiernan and Detectives Fruci and Casey then left for Florida.

On the morning of February 15, 1978, Hudepohl returned to the Brevard County Jail with Kampen's earlier taped statement, now transcribed; and Kampen still appearing calm and cooperative, signed the six-page statement before a Notary. Later that morning, Kampen and Brant were taken to the courthouse where new counsel were appointed to represent each of them; and they were arraigned on the Florida charges. District Attorney Tiernan and Officers Casey, Fruci and Hudepohl were in court during the arraignment of the defendants and knew that they were represented by counsel, Attorney Norwich having been appointed for Kampen and Attorney Cossaboom having been appointed for Brant. Further, the Massachusetts authorities and Hudepohl, by that time had formed the intention to interrogate Brant later that day.

After their arraignment, Kampen and Brant were returned to jail; and later that afternoon they were brought into the jail interview room where Tiernan, Casey, Fruci and Hudepohl had assembled. At 4:57 p.m. Hudepohl turned on his tape recorder and began to read Brant his rights from a document entitled, "Brevard County Sheriff Department Interrogation Preamble," (Exhibit 11).

This form, quite properly in view of the fact that Brant had already had an attorney appointed to represent him, asks specifically, "Are you willing to proceed without an attorney being present to represent you?" This question is followed by a blank space for the answer of the person being interviewed. When Hudepohl read this question to Brant, Brant replied, "No." Hudepohl wrote this response on the form and confirmed that Brant refused to answer any further questions without his counsel being present. One of the Massachusetts authorities then interjected the fact that Kampen had already made a statement to the police; and Hudepohl confirmed to Brant that this was so and that Kampen's statement had already been signed and notarized. Hudepohl then turned off the tape recorder.

Kampen remarked that his statement was "all lies;" and Brandt asked for a moment to speak with Kampen privately. He was afforded this privilege. Fourteen minutes after the interrogation had ceased, Brandt and Kampen returned to the interview room and Brandt asked that the tape recorder be turned back on as he wished to make a statement. Hudepohl complied, directing Brandt's attention to the

interrogation preamble, specifically the question of Brandt's willingness to proceed without an attorney being present to represent him. Brandt himself crossed out the response, "No," wrote in "Yes," and signed his name, indicating his willingness to give a statement without his attorney being present. Brandt indicated that he had changed his mind about giving a statement of his own free will, without any threats or promises.

Although Brandt stated he wished to make a statement, further proceedings followed a question and answer format, Hudepohl asking Brandt certain questions and Brandt responding. At one point Kampen volunteered a response when Brandt hesitated, or seemed uncertain; and one of the Massachusetts authorities commenced following up Kampen's response. Hudepohl then specifically reminded Kampen of his Miranda rights, ascertained that Kampen understood those rights, and asked him expressly, "In light of all that, do you still wish to talk to us without having an attorney here, or your attorney of record here in Brevard County?" Kampen responded, "Yeah."

Thereafter both Brandt and Kampen were asked further questions and responded thereto. Both Kampen's during the course of interrogation, the statements made by the person in custody cannot, over his objections, be admitted in evidence against him as a defendant at trial, even though the statement may in fact be wholly voluntary Michigan v. Mosley, 423 U.S. 98, 99-100 (1975). See Michigan v. Tucker, 417 U.S. 433, 443 (1974).

The first issue of concern is the length of time these defendants were held in custody prior to their making the incriminating statements at issue. While an unreasonably lengthy detention without the authorities from claiming that they "scrupulously honored" the rights of a suspect, (See Michigan v. Mosley, 423 U.S. 115,119 N6 (Brennan, J., dissenting), this is not such a case. There is no suggestion that the timing of the defendants' interrogations related in any way to their court appearances or that the Florida Court appearances were delayed until such time as Hudepohl might question Kampen; nor is there any suggestion that either defendant was prevented from communicating with his attorney at any time. Indeed, the Titusville Police afforded both the

defendants the opportunity to communicate with the Office of the Public Defender; and Brandt availed himself of that opportunity. The length of time in custody which elapsed prior to the questioning here does not, standing alone, warrant suppression of these statements.

Brandt, however, argues strenuously that his right to cutoff questioning was not "scrupulously honored." He points out that when he indicated that he did not wish to respond to questions in the absence of his attorney, he was at once reminded that his compatriot Kampen had given a signed statement to the police. That this comment was not without significance to the parties at that juncture is evidenced by the fact that Kampen immediately denied the veracity of his statement.

I find that the police, in permitting Brandt to speak with Kampen, hoped and expected that Brandt would change his mind and make a statement. (See U.S. v. Olof, 527 F2d 52, 754 (1975). Recognizing that Michigan v. Mosley does not establish a per se proscription against further questioning after a suspect has exercised his right to cut off interrogation, Brandt nevertheless

argues that, on the authority of Commonwealth v. Taylor, Mass. Adv. Sh. (1978) 394, 400-407, the brief interval between interrogations (14 minutes), the fact that the second statement was about the same crime and was given to the same interrogators as were present during the first interrogation, when coupled with the fact that Brandt's appointed counsel, known to the authorities, was not present, requires suppression of the second statement. See U.S. v. Clayton, 407 F. Supp. 204, 206-207 (E.D. Wisc. (1976). The Commonwealth counters, urging that since questioning was stopped promptly upon the exercise by Brandt of his rights, and since no further questioning of any sort took place until after Brandt himself expressed the desire to make a statement, after a break during which he consulted with someone other than the interrogators, Brandt's second statement ought not to be suppressed, under the Commonwealth v. Watkins, Mass. Adv. Sh. (1978) 1646, 1663.

The question is a close one. Both Taylor and Watkins depend upon a close reading of Michigan v. Mosley. The focus of the majority opinion in Michigan v. Mosley seems to be on reviewing police conduct which, if faulty, would appear to prevent

further questioning; that is, if the police failed to scrupulously honor a suspect's right to cut off questioning, further interrogation after a break can be viewed as an effort to wear down the suspect's resistance and make him change his mind (Michigan v. Mosley at 105-106). At the same time, the Court characterized as "wholly irrational" a "blanket prohibition against the taking of voluntary statements or a permanent immunity from further interrogation, regardless of circumstances" (Michigan v. Mosley, at 102). As I discern it, therefore, the teaching of Michigan v. Mosley, as expressed in Taylor and Watkins, is that, once a suspect has exercised his right to cut off questioning, the police must "scrupulously honor" that decision and must cease interrogation on that charge or that line of inquiry for some indefinite period of time; but that the suspect may himself choose to initiate further interrogation. Thus the suspect has it wholly within his control to decline to answer any further questions or to initiate further inquiry if he determines his interests are best served by so doing.

As in Watkins, I find that, once questioning of Brandt had initially ceased, the police did not further solicit him or apply any coercion or pressure on him, and I hold that in these circumstances Brandt's spontaneous declaration of his desire to make a further statement constituted an implied, if not expressed (See PP. 1-2 of Exhibit 10) waiver of his previously asserted desire to speak with counsel, which waiver is permitted under the Miranda and the Mosley decisions. Commonwealth v. Watkins at 1663, but see U.S. v. Jakakas, 423 F. Supp. 564, 566-567 (E.D.N.Y. 1976).

I rule that adequate Miranda warnings were given prior to taking any of the incriminating statements in question; that the defendants' rights to cut off questioning were "scrupulously honored;" and that in view of my finding of voluntariness there appears no reason why any of the statements in question ought to be suppressed on Fifth Amendment grounds.

2. The Defendants' Sixth Amendment Rights.

The defendants next argue that their Sixth Amendment right to counsel was violated by their interrogation in the absence of counsel following counsel's appointment to represent them. The

defendants rely most heavily on Brewer v. Williams, U.S. (19-7) 45 USLW 4287. The defendants argue, and I agree, that their right to counsel attached at least as early as the February 5th probable cause hearing in the Florida Court. See Argersinger v. Hamlin, 40 7 U.S. 25 (1972); Kirby v. Illinois, 406 U.S. 682 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963).

Adversary proceedings had then commenced against the defendants in Florida; and I reject any formalistic notion that the appointment of Florida attorneys on the Florida charges did not, at that time, call into play the defendants' rights to counsel on the Massachusetts charges as well. It is the essence of the attorney-client relationship that the client will reveal to the attorney, whatever the scope of his original engagement, ought have a complete background upon which to counsel his client. The proscription of DR7-104 (A) (1), and "ethical consideration" EC7-8 seem to me to require such an interpretation. Thus, in ascertaining Sixth Amendment rights I rule that the appointment of counsel on the Florida charges is the equivalent of the appointment of counsel on all pending charges against these

against these defendants; and that, thereafter, adversary proceedings having commenced against these defendants in Florida, they have a right to legal representation when the government interrogates them, Brewer v. Williams, 45 USLW, at 4291; and that "waiver requires not merely comprehension but relinquishment" (Brewer v. Williams, 45 USLW, at 4294). It is not enough, therefore, to simply read to a suspect his Miranda rights, thus reminding him of his right to the assistance of counsel. After Brewer, the correct rule, as I perceive it, requires further that the suspect expressly or implicitly indicate that he wishes to proceed with the questioning without his counsel being present. See U. S. v. Monti, 557 F. 2d 899, 904 (First Cir. (1977). (Suspect's derogatory comments about his counsel established his desire to go forward without counsel present).

In the instant case Hudepohl, in accordance with what appears to be a quite proper Brevard County practice, carefully and repeatedly asked both Brandt and Kampen expressly whether they wished to proceed without counsel present. Indeed,

on February 15, 1978, when Kampen began volunteering information during the interrogation of Brandt, Hudepohl stopped the proceedings and, among other things, asked him specifically whether "You still wish to talk to us without any attorney here or your attorney of record here in Brevard County." It is difficult to see how Hudepohl could have called more forcefully to Kampen's attention his right to have his appointed attorney present.

Despite Hudepohl's care, however, certain portions of the joint Brandt-Kampen statement (Exhibit 10) must be suppressed because no express or implicit waiver of counsel's assistance was obtained. Specifically, the answers provided by Kampen on pages 14 and 15 of Exhibit 10, which were volunteered prior to Hudepohl re-reading Kampen's rights to him and obtaining an express waiver of counsel's presence must be suppressed. For the same reason the affidavits of Kampen and Brandt attached to Exhibit 10 as well as their initials on each page must be suppressed. These affidavits were executed and the initials affixed on February 17, 1978, when the transcribed statement was given to both defendants for review and signature.

The Commonwealth has failed to show that Kampen and Brandt expressly or implicitly waived their right to the assistance of counsel at the time they executed these affidavits and initialed the joint statement. Since the statement is a joint one and the affidavits indicate that each defendant adopts and admits as true and correct the admissions of the other, I rule that the signing and initialing on the morning of February 17 was a re-interrogation, inadmissible in evidence absent an express or implicit waiver of the assistance of counsel.

Of course, suppression of the affidavits and initials does not mean that the 20-page transcript itself is to be suppressed. Save for the remarks of Kampen on pages 14 and 15 thereof, it is not. Nor does this partial suppression permit the defendants at trial to raise any inference with the jury that the joint statement was not, in fact, reviewed and signed. Should any such inference be suggested, it will be open to the Commonwealth to introduce the affidavits and initials for impeachment purposes since the suppression of the affidavits and initials "cannot be perverted into a license to use

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The statements given by Kampen and Brandt to Detective Casey on the way to the airport must also be suppressed since the Commonwealth has failed to prove that the defendants expressly or implicitly waived their right to the assistance of counsel at the time of that interrogation. The Commonwealth introduced credible evidence that Casey properly read to the defendants their Miranda rights from his Miranda card before discussing the substance of the offenses with them; but, unfortunately, the Miranda card was not introduced in evidence as suggested in Commonwealth v. Preston, 359 Mass. 268, 372 N.2 (1971). See Commonwealth v. Howard, Mass. App. Ct. Adv. Sh. (1976) 866,868 n.3.

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in the absence of sufficient evidence that the defendants, not merely comprehended their Sixth Amendment Right, but relinquished it, the statements to Officer Casey must be suppressed. (Brewer v. Williams, U.S. 45 USLW 4287, 4292.)

It follows that Kampen's motion to suppress must be allowed to the extent of suppressing his responses on page 14 and 15 of the transcript (Exhibit 10) and his signed affidavit and initials affixed thereto. His inculpatory statements to Officer Casey on the way to the airport are also suppressed. His motion is otherwise denied. Brandt's motion to suppress likewise is allowed to the extent of suppressing his affidavit attached to Exhibit 10 and his initials on each page thereof, as well as his inculpatory statements to Officer Casey on the way to the airport. His motion is otherwise denied.

BY ORDER OF THE COURT

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Justice of Superior Court

Entered: August 3, 1978

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